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No. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ALLAN FALK,

Appellant,

-v-

STATE BAR OF MICHIGAN,

Appellee.

On Appeal From
the Supreme Court of Michigan

JURISDICTIONAL STATEMENT

ALLAN FALK
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In propria persona
Counsel for Appellant

May, 1984

QUESTIONS PRESENTED

1. Does the First Amendment preclude a State unified bar association from expending compulsory dues of objecting members for:

a. Lobbying activities — efforts to influence Congress, the State Legislature, national and State Chief Executives, and State courts and administrative agencies in their respective rulemaking capacities;

b. In support of candidates for private office — to help a former State Bar President gain election to the Presidency of the American Bar Association;

c. Political and ideological activities other than lobbying — influencing public opinion on constitutional amendments, on attitudes toward the legal profession, and on the value and use of professional legal services;

d. Social activities open only to selected members and used for the purpose of acquiring and exercising political influence;

e. Economic activities benefitting only some members of the bar, those in private practice — lawyer referral services, lawyer placement services, prepaid legal service plans, Client Security Fund?

2. Has the State Bar of Michigan established that the activities adumbrated in Question 1 serve a "compelling governmental interest", or met any other recognized constitutional standard for overcoming Appellant's First Amendment rights in the premises?

3. Assuming *arguendo* the challenged activities of the

State Bar of Michigan, a State unified bar, do serve a "compelling governmental interest", is Appellant nonetheless entitled to relief because those activities could be carried on through a "less drastic means" which does not infringe Appellant's First Amendment rights, *i.e.* voluntary contributions, as was the case in the District of Columbia and is the case in States with voluntary bar associations?

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JURISDICTIONAL STATEMENT

REPORTS OF OPINIONS BELOW

The final opinion of the Michigan Supreme Court is reported at 418 Mich. 270, 342 NW2d 504 (1983); the first set of opinions of the Michigan Supreme Court is reported at 411 Mich. 63, 305 NW2d 201 (1981).

GROUNDS FOR JURISDICTION

(i) This action commenced as a complaint for superintending control, invoking the original jurisdiction of the Michigan Supreme Court over the State Bar of Michigan pursuant to MCL 600.215, MSA 27A.215; MCL 600.219, MSA 27A.219, and MGCR 1963, 851(6). The complaint

sought declaratory relief — a declaration that certain uses of mandatory dues collected by the State Bar of Michigan, a unified bar association by virtue of MCL 600.901 *et seq.*, MSA 27A.901 *et seq.*, and certain practices and policies of the State Bar of Michigan, are unconstitutional under the First and Fourteenth Amendments — and ancillary monetary relief, a rebate *pro rata* of mandatory dues thus unlawfully expended.

(ii) The final order and opinion of the Michigan Supreme Court were released on December 29, 1983; Appellant's timely motion for rehearing was denied March 6, 1984. Notice of Appeal was filed May 24, 1984 with the Michigan Supreme Court.

(iii) The jurisdiction of this Court is invoked pursuant to 28 USC § 1257(2) and *Lathrop v. Donohue*, 367 U.S. 820 (1961), where appeal was entertained to consider most of the specific issues herein raised, but decision on the merits was avoided due to procedural obstacles. See the discussion in *Abood v. Detroit Board of Education*, 431 U.S. 209, 233 n. 29 (1977).

Of the four justices of the Michigan Supreme Court constituting the majority supporting the decision to dismiss Appellant's Complaint, two interpreted MCL 600.901 *et seq.*, MSA 27A.901 *et seq.*, the statute creating the State Bar of Michigan, and State Bar Rules 1, 9, 11, promulgated by the Michigan Supreme Court, which define the objectives, powers, and duties of the State Bar of Michigan, as raising justiciable issues under the First Amendment. See 418 Mich. at 282 ff. The three dissenting justices on the seven member court also grounded their opinion in the First Amendment. The two remaining majority justices relied on

a procedural point twice rejected by all five of their colleagues; see 418 Mich. at 278. The pertinent federal questions were thus entertained by the court below, and the decision from which appeal is taken does not rest on an adequate state ground. *United Air Lines v. Mahin*, 410 U.S. 623, 630-631 (1977).

(iv) The Michigan statute and rules of Court, the constitutional validity of which are questioned by this proceeding, are as follows:

MCL 600.901; MSA 27A.901

The state bar of Michigan is a public body corporate, the membership of which consists of all persons who are now and hereafter licensed to practice law in this state. The members of the state bar of Michigan are officers of the courts of this state, and have the exclusive right to designate themselves as "attorneys and counselors," or "attorneys at law," or "lawyers." No person is authorized to practice law in this state unless he complies with the requirements of the supreme court with regard thereto.

MCL 600.904; MSA 27A.904

The supreme court has the power to provide for the organization, government, and membership of the state bar of Michigan, and to adopt rules and regulations concerning the conduct and activities of the state bar of Michigan and its members, the schedule of membership dues therein, the discipline, suspension, and disbarment of its members for misconduct, and the investigation and examination of applicants for admission to the bar.

State Bar Rule 1

The State Bar of Michigan is the association of the members of the bar of this State, organized and existing as a public body corporate pursuant to the powers of the Supreme Court over the bar of the State. The State Bar of Michigan shall, under these rules, aid in promoting improvements in the administration of justice and advancements in jurisprudence, in improving relations between the legal profession and the public, and in promoting the interests of the legal profession in this State.

State Bar Rule 9

The Board of Commissioners shall make the necessary appropriations for disbursements from the funds of the treasury to pay the necessary expenses of the State Bar of Michigan, its officers and committees. It shall be the duty of the Board to cause proper books of account to be kept. . .

State Bar Rule 11

Committees of the State Bar of Michigan may be established for the promotion of the objects of the State Bar of Michigan, and shall consist of limited numbers of members appointed by the President. . .

The classes of committees of the State Bar of Michigan shall be:

(a) Standing committees, for the investigation and study of matters relating to the accomplishment of the general purposes, business and objects of the State Bar of Michigan, of a continuous and recurring character, within the limitation of the powers conferred.

(b) Special committees, created by resolution of the Board of Commissioners defining the powers and duties of such committees, to investigate and study matters relating to the specific purposes, business and objects of the State Bar of Michigan of an immediate or non-recurring character. The life of any special committee shall expire at the end of the next annual meeting following its creation unless continued by action of the Board.

For purposes of jurisdiction under 28 USC § 1257(2), Appellant notes that the Rules Concerning the State Bar of Michigan, promulgated by the Michigan Supreme Court pursuant to the power delegated by the Michigan Legislature in MCL 600.901 and .904, MSA 27A.901 and .904, are deemed state "statutes". See *Lathrop v. Donohue, supra; In re Griffiths*, 413 U.S. 717 (1973); *Mayer v. City of Chicago*, 404 U.S. 189 (1971); *Ronwin v. Arizona Supreme Court*, 52 USLW ____.

STATEMENT OF THE CASE

Appellant is an attorney at law, duly licensed to practice law in the State of Michigan, and thus required by MCL 600.901; MSA 27A.901 to be a dues paying member of the State Bar of Michigan. Michigan is one of 34 States which have so-called "unified" or "partially unified" bars, in addition to the District of Columbia and Puerto Rico.

Appellant commenced this original proceeding in the Michigan Supreme Court, invoking that Court's power of superintending control over the affairs and activities of the State Bar of Michigan. Appellant's Complaint, originally denominated a "Petition for Special Relief", asserted that

the use of his mandatory dues for political and ideological purposes, particularly lobbying, maintenance of a statewide lawyer referral service, the funding of prepaid legal service projects, the creation and maintenance of the Client Security Fund, the funding of the lawyer placement service, expenditures for public relations to encourage Michiganians to utilize lawyers' services, and the expenditure of funds for social activities, were all in derogation of Appellant's rights under the First Amendment.

After the State Bar of Michigan answered the complaint, admitting the expenditure of mandatory dues as alleged but denying that such activities violate Appellant's First Amendment rights, the Michigan Supreme Court appointed Hon. Maurice E. Schoenberger, a former State District Court judge, as a fact finder, and directed him to conduct testimonial hearings on the complaint. 402 Mich. 960 (March 2, 1978).

Those hearings consumed two days and involved but three witnesses: Michael Franck, Esq., Executive Director of the State Bar of Michigan; John Clark, Esq., former State Bar President and former President of the American Judicature Society and a member of the American Bar Association House of Delegates, and Appellant Falk.

Mr. Franck's testimony detailed the manifold activities of the State Bar of Michigan and explained their purposes; Mr. Clark's testimony expanded on his opinion as to the public interest served by the maintenance and expansion of these activities by a unified bar. Appellant's testimony reiterated the allegations in his complaint, and noted that, by virtue of his position as a Commissioner of the Michigan Court of

Appeals, he is precluded from engaging in the private practice of law, and thus obtains no direct benefit from State Bar activities such as the Client Security Fund, prepaid legal services, lawyer referral service, or lawyer placement service.

The fact finder's report observed that the testimony adduced had been essentially uncontradicted, and that the issues presented involved the constitutional implications of the facts, rather than any debate over details. Deeming this beyond the scope of his appointment, he made no recommendations.

Appellant then submitted a brief and a supplemental brief; Appellee filed its answer brief; Appellant then filed a reply brief and Appellee a traverse thereto. By order of April 6, 1979, the Michigan Supreme Court directed its Clerk to calendar the case for June, 1979, and ordered the parties to print the briefs previously submitted.

The case was orally argued on June 5, 1979; on April 29, 1981 the Supreme Court of Michigan, in a per curiam opinion, announced that it was unable to reach a majority decision, and that further evidentiary hearings would be necessitated. Accompanying the per curiam opinion were three separate opinions, one by Justice Ryan, in which Justices Fitzgerald and Moody concurred, broadly but not completely supporting Appellant's positions. A second opinion, by Justice Williams, in which Chief Justice Coleman, who had not heard oral argument, concurred, essentially repudiated Appellant's arguments, except for a right of privacy claim involving the use of the State Bar's mailing list, an issue the other justices declined to consider on procedural grounds. The third opinion, by Justices Levin and

Kavanagh, rejected Appellant's arguments as to the Client Security Fund, Children's Charter, Lawyer's Wives, lawyer referral service, and educational activities aimed at the public and the profession — educational pamphlets, the Michigan State Bar Journal, public forums, continuing legal education programs (which Appellant specifically disavowed challenging), but indicated a need for additional evidence on other points, evidence the other justices, in their separate opinions, found unnecessary to decision.

The Michigan Supreme Court thereupon appointed Hon. James H. Lincoln, retired Probate judge, as master to preside over further hearings. Judge Lincoln called the parties into conference and presented his preliminary views on the issues remaining, focussing primarily on the lobbying question, his notion being that due process (notifying members before the Board of Commissioners of the State Bar takes a position on legislation or court rule amendments, and offering them an opportunity to be heard thereon) would cure any constitutional defects. Four months later, after 14 trial days involving 75 witnesses and the introduction of 98 exhibits, comprising 2500 pages of testimony, Judge Lincoln submitted his recommendation to the Supreme Court, paralleling exactly his original views.[1]

Before the second set of hearings, the State Bar agreed to allow members to delete their names from its mailing list when that list is used for commercial purposes, thereby satisfying Appellant's right of privacy claim, and to allow lawyers under 36 years of age or with fewer than 10 years of licensure in Michigan to withdraw their names from the

[1] Similar to the views of the Florida Supreme Court, 439 So2d 213, *infra*, p. 10.

roster of the Young Lawyers Section, thereby resolving in part one of Appellant's claims of forced association. Note that Appellant has never claimed that the basic forced association — membership in the State Bar itself — is inherently unconstitutional; Appellant has conceded that the unification of the State Bar passes muster under the First Amendment to the extent it subserves regulatory interests of the State, the need to identify, regulate, and discipline those licensed to practice law in Michigan.

The State Bar of Michigan accepted Judge Lincoln's recommendations, and has since taken steps to implement them. Appellant rejected the concept of providing notice and an opportunity for hearing as a sufficient safeguard for State Bar political and ideological activity, and briefed the constitutional questions thus presented.

Appellant submitted, on reargument, a witness by witness summary of the hearings before Judge Lincoln. The plurality opinion of Justices Ryan, Brickley, and M. Cavanagh specifically found that this summary was reasonably accurate and that the State Bar, by failing to file a counterstatement of facts, was deemed to have accepted it pursuant to the Court's rules of practice, MGCR 1963, 814.2, 854. See 418 Mich. at 307, n. 5. The other opinions did not directly address themselves to factual questions. That summary, crucial to an understanding of the issues herein presented, is reproduced in the Appendix (pages 135-175).

Following reargument on March 9, 1983, the Michigan Supreme Court rendered its decision on December 29, 1983. Again, a majority of the seven justices could not agree on an opinion. Two justices, Chief Justice Williams and Justice

Boyle, who had not been present for oral argument, examined what they termed "negative First Amendment rights" cases and came up with a formulation by which the invasion of Appellant's First Amendment rights is balanced against the magnitude of the government interest sought to be served, to determine whether the latter outweighs the former. See 418 Mich. at 288. Under this rubric, which expressly rejects the "strict scrutiny" test of classic First Amendment cases, they concluded that the State Bar activities challenged, particularly lobbying, do not impermissibly infringe on Appellant's First Amendment rights.

Two other justices, Levin and T.G. Kavanagh, rejected the conclusion of their five current colleagues and three former colleagues (Justices Moody, who died, and Coleman and Fitzgerald, who retired) that the complaint for superintending control properly invoked the Court's original jurisdiction, and held that the complaint should be dismissed on procedural grounds. This thus produced a majority of four justices voting for dismissal.

As indicated, Justices Ryan, Brickley, and M. Cavanagh basically agreed with all of Appellant's arguments and voted to require the State Bar of Michigan to refund the improperly expended portion of Appellant's dues (actually, by stipulation of the parties Appellant withheld dues while the suit has been pending; Justice Ryan's opinion therefore directs Appellant to pay the appropriate portion of dues, representing constitutionally valid bar expenditures), and to enjoin the State Bar from continuing specified activities so long as they are funded by mandatory dues — lobbying being primary among these (again, in actuality the Ryan opinion limits the State Bar to expending dues only for 6

approved purposes: (1) regulatory activities (not challenged); (2) continuing legal education (not challenged); (3) publication of the Michigan Bar Journal, except use of the Journal to promote political and ideological causes; (4) Client Security Fund; (5) educational activities aimed at the general public; and (6) lawyer referral service and legal services for the indigent. The State Bar would be permitted to engage in other activities only by using funds solicited from members making voluntary donations.

Appellant filed a timely motion for rehearing, which was denied, without further comment, on March 6, 1984. This Jurisdictional Statement was filed with the Court within 90 days of March 6.

REASONS FOR PLENARY CONSIDERATION

1. **Other State and Federal Courts which have considered the identical constitutional questions would have ruled in Appellant's favor; the resulting split of authority means that lawyers in Michigan have fewer First Amendment rights than lawyers in New Mexico, Montana, Wisconsin, the District of Columbia, and Puerto Rico.**

Appellant was the first lawyer to file a challenge to unified bar activities following the decision in *Abood v. Detroit Board of Education, supra*, and the Michigan Supreme Court's first set of opinions, 411 Mich. 63, 305 NW2d 201, represents the first reported judicial expression on those constitutional issues as applied to a unified bar association.

While reargument was pending, the plurality opinion of Justice Ryan, 411 Mich. 84-119, was adopted and followed by the Federal District Court of New Mexico in *Arrow v.*

Dow, 544 F Supp 458 (1983), a class action suit for money damages. Courts in Montana, *Reynolds v. State Bar of Montana*, 660 P2d 581 (Mont, 1983) and Puerto Rico, *Schneider v. Colegio de Abogados de Puerto Rico*, 565 F Supp 963 (1983) soon followed suit. Courts in the District of Columbia, *On Petition to Amend Rule 1 of the Rules Concerning the Bar*, 431 A2d 521 (DC App, 1981) and Wisconsin, *Report of Committee to Review the State Bar*, 334 NW2d 544 (Wis, 1983) changed the rules governing their respective bar associations to prohibit lobbying and other activities of those unified bar associations, thereby circumventing constitutional challenges.

Only Michigan and Florida, *The Florida Bar re: Amendment to Integration Rule of the Florida Bar (Political Activities of the Bar)*, 439 So2d 213 (1983) have rejected such challenges. The Michigan rejection has the narrowest support possible — of the ten justices to hear the case, 5 have voted to support Appellant's position, 3 against (two not having heard oral arguments), and 2 have refused to address the merits.

The First Amendment is the "supreme law of the Land", US Const, Art VI. Yet lawyers in Michigan and Florida are compelled to contribute bar dues for political and ideological expenditures, in particular for lobbying activities by their unified bar associations, while lawyers in other jurisdictions are free to disassociate themselves from these efforts when they disagree with the philosophy which motivates them or the goals toward which they are directed.

The Court should give plenary consideration to the issues herein raised so as to make uniform the application of the

First Amendment to lawyers in all jurisdictions subject to the Constitution of the United States.

2. **The Michigan Supreme Court has misapprehended the concept of "germaneness" in creating an unprecedented balancing test by which lawyers' First Amendment rights may be overcome by state interests which are merely positive but not "compelling".**

That part of the majority of the Michigan Supreme Court which addressed the constitutional issues on the merits purports to extract, from selected "negative First Amendment" cases, a "balancing test" for determining when individual First Amendment rights must yield to State interests. Rather than apply the traditional "compelling State interest" test, the Michigan Supreme Court purports to recognize a "sliding scale approach":

> "The more serious the infringement of individual interests, the more vital the asserted advancement of government interests must be to outweigh the infringement and vice versa. The question in each case must be whether the compelled participation in expression infringes unduly upon individual interests."

418 Mich. at 292, citing Gaebler, First Amendment Protection Against Government Compelled Expression and Association, 23 BC L Rev 995, 1016 (1982).

The error in this approach is manifest. First, the cases relied upon do not support it. For example, in *Wooley v. Maynard*, 430 U.S. 705 (1977) this Court disavowed expressly any distinction between "positive" and "negative"

First Amendment rights:

"We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all . . . A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.' "

430 U.S. at 714.

Moreover, this Court in *Wooley* explicitly applied a "least drastic means" test to the balancing process — a traditional, alternative formulation of "strict scrutiny":

> "Even were we to credit the State's reasons and 'even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.' *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)."

430 U.S. at 716.

The evidence established, without contradiction, a readily available "less drastic means" — voluntarization of the non-regulatory functions of the State Bar of Michigan. Mr.

James Bierbower, President of the unified District of Columbia Bar Association, and former President of the voluntary Bar Association of the District of Columbia, testified that after the District of Columbia Court of Appeals restricted the uses to which mandatory dues could be put his association continued its non-regulatory programs unabated in level or scope, using voluntary contributions which the association solicited from its members.[2] Thus, even if a unified bar association's non-regulatory activities could be considered to subserve a "compelling state interest" — a test the Michigan Supreme Court, 5-2, concluded the State Bar of Michigan could not meet — the existence of a less drastic alternative would preclude continuation of the present arrangement whereby these activities are financed with mandatory dues.

Buttressing this conclusion is this Court's closing fillip in *Wooley, Id.*:

> "However, where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message."

To like effect is this Court's disclaimer in *Abood v. Detroit Board of Education, supra*, 431 U.S. at 235-236, recently reaffirmed in *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, ____ U.S. ____, 52 USLW 4499 (1984):

> "We do not hold that a union cannot constitu-

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[2] Appendix, pp. 174-175.

> tionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of ideological causes not germane to its duties as collective bargaining representative. Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing these ideas and who are not coerced into doing so against their will..."

Compulsory membership in any organization is, under our constitutional scheme, aberrant, *NLRB v. Granite State Joint Bd*, 409 U.S 213, 216 (1972), and the impingement on individual First Amendment rights that inheres in such forced association is constitutionally permitted only when the association itself, in the first instance, serves a compelling State interest — "labor peace" in the case of the agency shop, professional responsibility and integrity in the case of the unified bar — and when each activity of that association is integrally and intimately related to accomplishing that compelling State interest. *Ellis v. BRAC, supra.* Every "negative First Amendment" case has thus, contrary to the position of Justices Boyle and Williams below, applied a "compelling government interest" test — which they acknowledge the State Bar of Michigan cannot meet and has not met: *Storer v. Brown*, 415 U.S. 724 (1974); *Grayned v. City of Rockford*, 408 U.S. 104, 115-116 (1972); *Miami Herald Pub Co v. Tornillo*, 418 U.S. 241 (1974); *Selfridge v. Carey*, 522 F Supp 693, 696 *affirmed* 660 F2d 516 (CA 2, 1981). Their reliance on *Prune Yard Shopping Center v. Robins*, 447 U.S. 74 (1980) as authority for trampling on Appellant's First Amendment rights is particularly disingenuous, inasmuch as this Court held therein that a State

could EXPAND individual First Amendment rights; nothing was said to suggest that a State could DEROGATE such rights.

All these cases were cited to the Michigan Supreme Court in one or more of Appellant's briefs. The law and the evidence both stand uncontradicted; there is no basis for "weighing" individual First Amendment rights against merely "worthy" government interests.

It should also be noted that the opinion of Justices Boyle and Williams below proceeds on the assumption that, without using mandatory dues to further its non-regulatory activities, the State Bar of Michigan would have to abandon them, to the great detriment of the public interest in having input from the organized bar. Putting aside that these fears are inconsistent with the evidence — Mr. Bierbower's testimony — they are equally at odds with legal precedent.

In Michigan, State agencies other than the State Bar of Michigan are already precluded from using public funds — whether mandatory dues or compelled tax monies — either to lobby or to influence public opinion. *1979 Op Atty Gen No. 5597; 1965-66 Op Atty Gen Nos. 4291, 4421; 1969-70 Op Atty Gen No. 4647.*

Similarly, Congress has enacted a variety of prohibitions on lobbying and other political activity, without noticeably damaging the public weal: 18 USC 1913 bans lobbying by any State, subdivision or organization receiving federal funds; 31 USC 6715 and 1243(d) are to like effect; 26 USC 501(c) prohibits political activity by tax exempt groups (*Quaere* whether the State Bar of Michigan has run afoul of

this enactment); Generally, see "Political Activities" in Index O to R of West's *United States Code Annotated.*

Thus, non-regulatory activity, and particularly political activity, by a unified bar association falls far short of serving a sufficiently weighty State interest to justify any infringement on Appellant's First Amendment rights, even under a test less exacting than the established "compelling State interest, least drastic means" test.

Incidentally, the type of "non-regulatory" activity under scrutiny in this case, other than lobbying, includes the Client Security Fund, which reimburses victims of attorney peculations, in the discretion of the Board of Commissioners of the State Bar, to a maximum of $15,000, but does not cover "one client" situations (corporation counsel, *e.g.*) or attorneys, such as Appellant, who are employed by a government agency. Testimony established that "less drastic" alternatives, which are superior in every respect, exist — mandatory bonding and mandatory malpractice insurance for attorneys in private practice (see testimony of David Jordon, Esq.). Even the dissenters failed to address these alternatives head on, or to analyze the subsidy nature of the Fund — Appellant, although barred from private practice of law, must help private practitioners defray the expense of what is, in essence, a fiduciary bonding scheme.

The State Bar of Michigan has also provided seed money for prepaid legal service plans; the bar's own witness, Lawrence Nolan, Esq., testified that his interest in the concept was purely economic — a desire to expand the scope of his private practice.

Again and again, the testimony revealed that the activities of

the State Bar of Michigan, directly or indirectly, benefit the economic interests of lawyers — not all lawyers, but those in private practice, who dominate the organizational hierarchy. Again and again, the State Bar defends its activities as also serving some public interest — making legal services more available to the middle class, blue collar worker in the case of prepaid legal service plans — which is seen to be serendipitous rather than central or inherent. Appellant is forced to contribute to the financial aggrandizement of other lawyers, who use his money to foster their political and public relations goals.

Neither the Boyle-Williams nor the dissenting opinion below specifically dealt with the State Bar's contribution of $5,000 of mandatory dues monies to the campaign of Wallace D. Riley, Esq., who was then seeking the office of President of the American Bar Association. This issue was raised both by Appellant and Judge Lincoln; no defense has ever been proffered on behalf of the State Bar of Michigan. One beacon of the deficiencies in the Boyle-Williams approach is that this blatantly unconstitutional expenditure was totally ignored in their opinion.

The State Bar has frequently defended its political actions by noting that it is democratically organized on a "one lawyer, one vote" basis. So, of course, are unions, by virtue of the Labor Management and Disclosure Act, 29 USC 481 ff. This made no difference to the result in either *Abood* or *Ellis, supra*; it makes none here. The whole idea of a Bill of Rights is that it cannot be overcome at the whim of a transient majority.

The result below is legally wrong, historically erroneous,

at odds with the uncontradicted evidence, and intellectually dishonest. This Court should grant plenary consideration and reverse, adopting and expanding the result promoted by the dissent.

3. **The use by a unified bar association of mandatory dues for non-regulatory purposes, over the objection of a member, violates that member's First Amendment rights.**

This Court said essentially that in *Abood, supra*, when it reviewed its earlier treatment of these same issues in *Lathrop, supra*, and found that it was writing on clean slate — no majority having coalesced in prior cases on the constitutional issues presented. Conceptually, a unified bar is like a union or agency shop. One may be forced to become a member or otherwise associate, but the infringement of First Amendment rights is self-limiting by the necessity which gave rise to the compulsion. The union or agency shop promotes "labor peace"; this nation's history of labor strife — the Pullman strike, the Cordwainer's strike, the Clayton Act, the "wobblies" so near and dear to the heart of the late Justice Douglas of this Court — establish the social and political necessity sufficient to meet the "compelling government interest" standard.

Whether the history of regulation of the legal profession is quite so compelling is open to question, but that question has not been asked by Appellant, who has conceded from the outset what Mr. Bierbower's testimony suggested, that effective regulation requires that the State have available every lawyer's name, business address, and control over the issuance and use of the license to practice law, something only a unified bar might be able to achieve.

But no such overriding necessity has been suggested or demonstrated to justify extending the uses of mandatory bar dues to non-regulatory areas, especially to lobbying, campaign contributions, and ideological activities such as public relations campaigns designed to foster the image of lawyers and the use of lawyers' services by the public.

Even if there were a "compelling government interest" in assuring continued input into the political equation by the organized bar because of its ostensibly "unique" perspective on the ordering of public affairs, still, the State Bar of Michigan has failed to overcome the only evidence in the record, which establishes beyond peradventure that a less drastic alternative — compelled by the First Amendment, *Shelton v. Tucker, supra* — exists, namely, voluntarization of the funding of such activities.

Not only does the District of Columbia experience establish the efficacy of this alternative. So too does the testimony of the Presidents of the voluntary bar associations of Iowa, Maryland, and Ohio, the latter in particular being demographically and economically similar to Michigan. All those officials testified that their bar associations, using only dues voluntarily contributed, carry on active lobbying before State and national legislatures, maintain Client Security Funds, foster prepaid legal service plans, maintain lawyer referral services, publish pamphlets and brochures explaining the legal rights of the public and promoting the use of lawyers' professional services, in short, that they duplicate, generally and in every particular, the non-regulatory activities of the State Bar of Michigan. To their testimony must be added the dozens of exhibits from the voluntary bar associations in Illinois, New York and else-

where, to like effect.

That *Abood* applies is no longer controverted; that the non-regulatory activities of the State Bar of Michigan fail to meet the "compelling government interest and least drastic means" tests established by this Court was recognized by a MAJORITY of the Michigan Supreme Court. What remains to be declared is that there is no lesser test, and/or that, even if there were, the activities in question are insufficiently consequential to outweigh Appellant's timely and properly asserted First Amendment rights. *Wooley v. Maynard, supra.*

It comes as no shock to this Court that the organized legal profession piously professes to be the loyal slave of the public interest while at the same time greedily amassing an ever larger share of the national economic pie. This Court heard — and rejected — such arguments in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). The medical profession tried the same tack in *American Medical Ass'n v. FTC*, 50 USLW 1107, in a debate the legal profession is now carrying to the Congress. The point was aptly summed up by *Time* magazine in a 1977 article dealing with the 100th anniversary of the American Bar Association:

> "Lawyers still hold themselves out as above the public fray and capable of self regulation. It is the same argument put out by meat manufacturers in 1906 and by auto manufacturers in 1965."

And what is the public interest being served by lobbying on the following issues, assuming *arguendo* application of an attenuated standard of governmental interest? These are

some of the positions taken by the State Bar of Michigan:

a. An effort to increase the permissible contingency fee rate set by MGCR 1963, 928;

b. Opposed 1978 HB 4263, which would have eliminated Michigan's application of the "American Rule" with respect to taxing attorney's fees as costs, see *State Farm Mutual Auto Ins. v. Allen*, 50 Mich. App. 71, 75, 212 NW2d 821 (1973), and allowed recovery of actual costs plus reasonable attorney fees for the defense of an action dismissed on summary judgment or on a finding of no cause for action after trial. To like effect was the State Bar's position on 1980 HB 4264. The Board of Commissioners has unswervingly opposed modification of the American Rule, despite the fact that several witnesses, including the chairman of the Real Property Committee (describing the Condemnation Act amendments fostered by the work of his committee), spoke against the American Rule as unjust;

c. "Strongly supported" 1978 HB 5173, mandating appointment of counsel for persons named in guardianship petitions;

d. Actively opposed 1978 SJR E which would have replaced the existing disciplinary structure with an "attorney tenure commission";

e. Strongly opposed various post-Watergate governmental reforms, including what became Michigan's Open Meetings Act, PA 1976, No 442, MCL 15.231 *et seq.* and the Lobbying Registration and Disclosure Act, 1978 PA 472, MCL 4.411 *et seq.* The State Bar also lent moral encouragement to judicial action to forestall implementation of the lobbying law, ultimately unsuccessful. *Pletz v. Secretary of State*, 125 Mich. App. 335, 336 NW2d 789 (1983), *lv den* 417 Mich. 1100.20 (1983);

f. Supported 1979 HB 5248, which would have increased

the maximum allowable group life insurance coverage to $75,000 (from $50,000) and allowed subsequent increases to keep pace with inflation.

A pattern is discernible. Legislation which would increase economic opportunities for lawyers is favored; that which would increase competition, or dissuade potential litigants from pursuing meritless lawsuits, is opposed. The public interest may be served, but only serendipitously or synergistically, never through advertence. Any nexus to the bar's regulatory functions has yet to be identified.

The Williams-Boyle "balancing test" carefully avoids any specifics, but deals exclusively in generalities, with one exception:

> "Clearly, the input of the Criminal Law Section is invaluable to the Legislature in its task of revising Michigan's Criminal Code."

418 Mich. at 298.

If the evidence makes anything clear, it is that the work of the Criminal Law Section has been inimical to the Legislative effort and to the public interest! The State Bar's draft of the revised criminal code contains a section on the use of deadly force that was roundly condemned by the Michigan Civil Rights Commission in its "Deadly Force Report", based on public hearings in which not a few law enforcement officers supported the Commission's position (exhibit 44).

For example, the bar version of the revised criminal code would allow a truant officer to use deadly force to stop a truant student from escaping from his custody — a result

Judge Lincoln commented on, based on his years of experience as a juvenile court judge. Judge Lincoln found this codification horrifying, noting that in all the years he was in charge of the Wayne County juvenile home deadly force was never justified in preventing an escape.

It should also be noted that this codification was prepared by a Special Committee, and NOT by the Criminal Law Section — sections are supported by voluntary additional dues, and their activities, so long as not suggesting the imprimatur of the State Bar itself, are not within the scope of this litigation.

Of course, acknowledging Appellant's First Amendment rights would not preclude the judiciary, the legislature, or the executive from enjoying the benefits of the collective or individual expertise of lawyers on topics of interest. Individual lawyers are obviously free to contribute their advice and experience, either on request or *sua sponte*, something the testimony established regularly occurs. Indeed, as to the collective wisdom of the bar, the Supreme Court of Michigan itself has regularly gone OUTSIDE the structure of the State Bar of Michigan to acquire it. Recent examples of this phenomenon are amendments to the class action suit rule, GCR 208, for which the court appointed its own committee, see 59 Michigan Bar Journal 476 (July, 1980) and 60 Michigan Bar Journal 687 (Sept. 1980), and changes to the Judicial Tenure Commission rules initiated by the Michigan Judges Association, see 413 Mich. 1102. Much of the work of which Mr. Dethmers (see Appendix, page 142) was so proud was done for committees appointed by the court in similar fashion.

To this must be added, again, the District of Columbia

experience — after the unified bar was forbidden to lobby with mandatory dues it collected sufficient voluntary contributions to continue its programs, in their entirety, unabated. Thus, the only evidence in the record establishes that when the uses to which mandatory dues can be put are circumscribed, the public interest, to the extent served by "political" activities of the bar, suffers absolutely no harm.

Therefore, any "balancing" of Appellant's First Amendment rights against the "public interest" is a weighing of something against nothing, because recognition of and respect for those rights entails no damage to the public weal.

4. State Bar expenditures for social activities open only to invited members of the bar violate Appellant's First Amendment rights.

The Boyle-Williams opinion addresses Appellant's challenge to State Bar social activity expenses and finds no implication of First Amendment interests, only of "economic" interests. 418 Mich. at 294. This Court, in *Ellis v. BRAC, supra*, 52 USLW at 4504, similarly found no infringement of First Amendment rights beyond that inherent in a union shop situation in passing on the constitutionality of union social hours.

The difference between State Bar social expenditures and those surveyed in *Ellis* is that those by the State Bar are for selected guests, rather than all bar members, while the expenditures of the Grand Lodge in *Ellis* were "formally open to nonmember employees". 52 USLW at 4503. As with expenditures for the lawyer placement service, lawyer referral service, and prepaid legal services, the State Bar is

forcing all lawyers to subsidize the economically aggrandizing political activities of a select few — principally expanding the economic horizons of lawyers in private practice at the expense of those in government service like Appellant.

It should not be doubted, either, that State Bar social activities are "political" — it was specifically established in the testimony of John Clark that a principal goal of such activity is to inculcate friendly attitudes by those who regulate the State Bar and those to whom the State Bar must go for desired legislative changes. Union social hours are for the enjoyment and fraternization of union members; State Bar social functions are one cog in its political activity machinery.

5. **The lawyer referral service, lawyer placement service, and prepaid legal service activity do not serve any cognizable governmental interest.**

The Michigan Supreme Court unanimously approved the expenditure of mandatory bar dues for the lawyer referral service. Yet this service is of no significant value to the public.

The service merely advises callers in need of legal assistance of the names of private practitioners who have described themselves as competent in the area of interest, and who are geographically near the inquirer. The Michigan Supreme Court, however, by contrast, rejected out of hand a proposal to certify lawyers as specialists based on self-designation (see the testimony of Sandor Gelman in the Appendix, pages 144-5).

Nor is any effort made to evaluate participants in the

service for competence; it is merely a convenient free service to private practitioners by which they can expand their client bases. Massachusetts' voluntary bar runs such a service and profits from it handsomely, since lawyers there recognize the economic value of the service to them and are willing to pay for it by sharing the resulting profits (see testimony of Thomas Wynn in the Appendix, p. 174). All other bar associations queried provide identical services at no cost to non-participants.

The lawyer placement service similarly benefits lawyers looking for work. No other job finding service in the nation is supported by compelled exactions from those who do not use the service (except, of course, government employment services, but the distinction between what government can do through legislative mandate and what quasi-governmental agencies can do at their discretion is well established). See *Ronwin v. Arizona Supreme Court*, ____ U.S. ____, 52 USLW ____ (May 14, 1984); *cf. Bates v. State Bar of Arizona*, 433 U.S. 350.

The purpose of State Bar support for prepaid legal services has been noted above (see testimony of Lawrence Nolan in the Appendix, p. 151) — profit for lawyers.

When a unified bar focuses its efforts on improving the economic lot of members, some or all, it becomes a guild or union. "Labor peace" however is not served by a lawyer's union in this context, so economic activities are not on the same plane as those by true unions, whose very *raison d'etre* is to improve wages, hours, and terms and conditions of employment of its members. A union that used compulsory fees to work for the benefit of only a few of its members,

outside of the scope of collective bargaining would not be deemed to have met the *Abood-Ellis* test of "germaneness". And, even in a union shop, there is always the opportunity for employees to vote to decertify the union, a saving grace not shared with a unified bar.

The distinction between a unified bar and a union thus calls for additional circumscription in the permissible uses of mandatory dues.

CONCLUSION

For the reasons stated herein, and those set forth in the two opinions authored by Justice Ryan in the Court below, probable jurisdiction should be noted and full briefs on the merits should be ordered.

Respectfully submitted,

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(2)

84-319
No. _____

Supreme Court, U.S.
FILED
MAY 30 1984
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ALLAN FALK,

Appellant,

-v-

STATE BAR OF MICHIGAN,

Appellee.

On Appeal From
the Supreme Court of Michigan

APPENDIX

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160 pp

EDITOR'S NOTE

PAGES 1 thru 1a WERE POOR HARD COPY AT THE TIME OF FILMLNG. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

FINAL OPINION
State of Michigan
In the Supreme Court
ALLAN FALK -v- STATE BAR OF MICHIGAN

PER CURIAM. Disposition of this matter requires us to determine whether petitioner Falk is entitled to the relief he prayed for in his "Petition for Special Relief" originally filed November 30, 1977.

A majority of the Court is not persuaded that he is so entitled and, accordingly, the relief requested in the Petition for Special Relief is denied.

This proceeding has convinced us all, however, that certain practices of the State Bar may warrant closer scrutiny pursuant to our duty to superintend its activities. We will in the near future, therefore, by separate administrative order, appoint a committee to review those practices and activities and make recommendations to the Court.

Petition dismissed.

WILLIAMS, C.J., and KAVANAGH, LEVIN, RYAN, BRICKLEY, CAVANAGH, and BOYLE, JJ., concurred.

BOYLE, J. Plaintiff Falk began this suit on November 30, 1977, by filing a "Petition for Special Relief" naming the State Bar of Michigan as defendant. Plaintiff raised First Amendment constitutional challenges to various activities of the State Bar based on the funding of those activities from his mandatory dues.[1] This Court appointed former Judge Maurice E. Schoenberger to conduct a hearing and make findings of fact. After receipt of Judge Schoenberger's report and the transcript of the hearing he conducted, and after briefing and oral argument, this Court rendered its first opinion

[1] Plaintiff has not contested the validity of expenditures in support of the Attorney Grievance Commission, the Character and Fitness Committee, and the Institute for Continuing Legal Education.

in this case. *Falk v State Bar of Michigan*, 411 Mich 63; 305 NW2d 201 (1981) *(Falk I)*.

The members of this Court were unable to agree in *Falk I* concerning the extent of the relief, if any, that plaintiff should receive. The Court unanimously agreed, however, that further factual findings should be ordered. Therefore, the Court appointed the Honorable James H. Lincoln to conduct additional hearings. The Court ordered further development of the record with regard to the following activities of the State Bar:

> "[T]he Young Lawyers Section and Lawyers Wives, the Lawyer Placement Service, the commercial sale of the bar's mailing list, and bar activities addressed to influencing legislation." 411 Mich 83.[2]

We now have the results of those extensive hearings. Both sides have again briefed and argued the relevant issues.

At the outset, I agree with the opinion of Justice RYAN in *Falk I*, pp 84-87,[3] concerning our jurisdiction to hear and dispose of this case. That is, I agree that plaintiff's petition most closely resembles and is properly treated as a complaint for a writ of superintending control under GCR 1963, 851(6); MCL 600.215, 600.219; MSA 27A.215, 27A.219. I note also that Justice WILLIAMS in his opinion in *Falk I, supra*, p 122, fn 4, reached this issue and concurred with Justice RYAN's treatment

[2] In connection with the Lawyers Wives activities, the Court advised that no further evidence was necessary concerning the preparation and distribution of the Juror's Manual, the distribution of the "You and the Law" booklet, and funding of the Children's Charter. 411 Mich 83, fn 1.

[3] I do not, however, adopt the disposition of plaintiff's invasion of privacy claim made by Justice RYAN in *Falk I*, 411 Mich 85, fn 3. Nor do I adopt his disposition of plaintiff's First Amendment challenge to bar expenditures for certain social functions, *id.* See discussion below.

of the petition as a complaint for a writ of superintending control. Because five members of this Court have previously reached and disposed of this issue, it is properly viewed as the law of the case. Therefore, I agree that this case is properly within this Court's original jurisdiction.

I. THE EFFECT OF *FALK I*

As pointed out in the several opinions in *Falk I*, it is undisputed that the State Bar of Michigan is an "integrated bar". "[T]he State of Michigan, through the combined actions of this Court, the Legislature, and the State Bar, compels all licensed attorneys to associate in and provide financial support for the integrated State Bar." *Falk I, supra*, p 87 (opinion of RYAN, J.).

Plaintiff challenges the use of his mandatory dues to finance various activities of the bar. Justice WILLIAMS listed those activities in *Falk I:*

> "(1) lobbying and other political activity, (2) compulsory membership in Young Lawyers Section, (3) promoting prepaid legal services, (4) lawyer referral, (5) lawyer placement, (6) Client Security Fund, (7) public education about legal services, (8) funding of Lawyers Wives of Michigan and Children's Charter of Michigan activities, (9) giving and paying for social functions, including those where the Supreme Court Justices are guests of honor, (10) appearing before the State Officers Compensation Commission in support of higher Supreme Court and other judicial salaries, and (11) sale of use of State Bar mailing roster." 411 Mich 120.

Upon analysis of the several opinions in *Falk I*, it appears that some of these challenged activities have passed constitutional muster. The Court unanimously rejected plaintiff's challenge to the use of his dues for support of the bar's lawyer

referral service.[4] The Court was also unanimous in rejecting the challenge to expenditures for public education about legal services.[5] A majority of the Court also upheld the use of bar dues to finance a Client Security Fund.[6] By application of the law-of-the-case doctrine, we are foreclosed from reconsideration of those items here.

In addition, two other challenges are now moot. At the present time, the bar provides an opportunity to its members to remove their names from the mailing list which is offered for sale to interested parties. Similarly, otherwise eligible members of the Young Lawyers Section may disassociate themselves from membership in that organization.[7] Therefore, neither of these issues presents a constitutional question requiring resolution at this time.

To summarize, plaintiff's challenges to the following activities remain undecided after *Falk I*: (1) certain activities of the Young Lawyers Section, (2) promotion of prepaid legal services, (3) lawyer placement services, (4) certain activities of the Lawyers Wives, (5) social functions, (6) appearing before the State Officers Compensation Commission, and (7) lobbying and other political activity.

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[4] *Falk I, supra*, pp 115-116 (opinion of RYAN, J.); pp 153-156 (opinion of WILLIAMS, J.); pp 175-176 (opinion of LEVIN, J.).

[5] *Falk I, supra*, p 115 (opinion of RYAN, J.); pp 157-158 (opinion of WILLIAMS, J.); pp 175-176 (opinion of LEVIN, J.). I also find that the combined opinions of Justices WILLIAMS and LEVIN have validated bar expenditures which relate to the public education activities of the Young Lawyers Section and the Lawyers Wives, specifically the publication and distribution of the Juror's Manual, the "You and the Law" booklet, and the funding of the Children's Charter. *Falk I, supra*, pp 151-153, 157-158 (WILLIAMS, J.); p 176 (LEVIN, J.).

[6] *Falk I, supra*, p 115 (opinion of RYAN, J.); pp 153-156 (opinion of WILLIAMS, J.). The opinion of Justice LEVIN, which was joined by Justice KAVANAGH, was silent on this issue.

[7] Some funded activities of the Young Lawyers do continue to present a live controversy. See discussion below.

II. THE CONSTITUTIONAL TEST

As indicated above, there was no agreement among a majority of the members of this Court in *Falk I* concerning the proper constitutional standard to be applied to test plaintiff's challenges to expenditures of the integrated State Bar of Michigan. Three members of the Court believed that relevant First Amendment[8] decisions of the United States Supreme Court required that bar activities be subjected to strict scrutiny:

"We therefore conclude that, in light of the controlling First Amendment principles as hereinabove discussed, the State of Michigan, through the combined actions of this Court, the Legislature, and the State Bar, may compulsorily exact dues, and require association, to support only those duties and functions of the State Bar which serve compelling state interests and which cannot be accomplished by means less intrusive upon the First Amendment rights of objecting individual attorneys." 411 Mich 112 (opinion of RYAN, J.).

Two other members of the Court believed a different constitutional test was applicable:

"We find that the First Amendment is not absolute but will give way to certain state activities which are germane to a compelling state interest. The state has a compelling interest in promoting improvements in the administration of justice and advancing the science of jurisprudence in order to fulfill its function of protecting the health, safety and welfare of its citizens. The

[8] We recognize that it is technically a violation of the Fourteenth Amendment that plaintiff asserts has occurred through the action of the State of Michigan. It is through the Due Process Clause of the Fourteenth Amendment that First Amendment freedoms are protected from infringement by the states. See *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council, Inc*, 425 US 748, 749, fn 1; 96 S Ct 1817; 48 L Ed 2d 346 (1976). We will refer to the First Amendment for the sake of convenience.

state may employ activities which are germane to this compelling state interest." 411 Mich 132 (opinion of WILLIAMS, J.).

The remaining two members found it unnecessary to decide what the appropriate standard of judicial scrutiny was because of the inadequately developed record.[9] See *Falk I, supra*, p 175 (opinion of LEVIN, J.).

I am unable to agree that either of the formulations of the constitutional test in *Falk I* is correct. I am brought to this conclusion by a careful analysis of the precise First Amendment interest to be protected under these circumstances and by an examination of the cases in which the United States Supreme Court has discussed such an interest.

A. The Interest

The most familiar First Amendment claim is a challenge to state action in which a citizen complains of some interference by the government with an attempt to exercise, in an affirmative way, protected rights to speak or to associate with others. Typical First Amendment cases involve persons who wish to express themselves in a particular manner in the face of limiting or prohibitory government regulation.[10] Other typical cases involve individuals who wish to associate with others and who claim that governmental action in some manner inhibits their ability to do so.[11]

This case does not fit the typical mold. Rather,

[9] However, Justice LEVIN did find that certain activities of the bar were clearly permissible even under the strictest standard of review. *Falk I, supra*, pp 175-176. See discussion in Part I.

[10] See, *e.g.*, *Shuttlesworth v City of Birmingham*, 394 US 147; 89 S Ct 935; 22 L Ed 2d 162 (1969).

[11] See, *e.g.*, *Keyishian v Board of Regents of University of State of New York*, 385 US 589; 87 S Ct 675; 17 L Ed 2d 629 (1967).

what plaintiff complains of here is, in essence, government action which compels him to associate and compels him to participate in certain forms of expression.[12] The right that plaintiff asserts is a right of non-association and of non-expression.

Because the individual seeks, in effect, to remain silent, the right of non-association cannot logically be based on the policy of maintaining a "free market place for ideas" which is usually advanced in connection with rights of unfettered expression. However, compelled association can reasonably be seen as an infringement upon more personal individual interests such as freedom of conscience. See Gaebler, *First Amendment Protection Against Government Compelled Expression and Association*, 23 BC L Rev 995, 1004 (1982). Professor Laurence Tribe has described this interest more completely:

"The Constitution has enumerated specific categories of thought and conscience for special treatment: religion and speech. Courts have at times properly generalized from these protections, together with the guarantees of liberty in the due process clauses of the fifth and fourteenth amendments, to derive a capacious realm of individual conscience, and to define a 'sphere of intellect and spirit' constitutionally secure from the machinations and manipulations of government." Tribe, *American Constitutional Law*, § 15-5, pp 899-900.

Recognition of the nature of plaintiff's interest is the analytical *sine qua non* for resolution of the issues currently before the Court and also the appropriate vehicle for understanding and harmonizing the relevant United States Supreme Court

[12] Such rights have been referred to as "negative" First Amendment rights. Gaebler, *First Amendment Protection Against Government Compelled Expression and Association*, 23 BC L Rev 995, 996 (1982).

decisions. Once harmonized, these cases produce a test which can be applied to the facts of the case at bar.

B. The Cases

The Supreme Court of the United States has recognized a constitutional right of non-association in several cases.[13] The first of these was *West Virginia State Bd of Ed v Barnette*, 319 US 624; 63 S Ct 1178; 87 L Ed 1628 (1943). In that case, the school board required all students and teachers to salute the flag and recite the pledge of allegiance in the classroom. Failure to do so constituted grounds for expulsion or dismissal. Plaintiffs, who were Jehovah's Witnesses, refused to salute the flag because of their religious beliefs. The Court invalidated the statute on First Amendment grounds.[14]

The next case decided by the Court which involved negative First Amendment rights was *Wooley v Maynard*, 430 US 705; 97 S Ct 1428; 51 L Ed 2d 752 (1977). Mr. and Mrs. Maynard, Jehovah's Witnesses, objected to the display of the New Hampshire state motto, "Live Free or Die", on the license plate of their automobile. When they cov-

[13] One case which is not discussed here is *Elrod v Burns*, 427 US 347; 96 S Ct 2673; 49 L Ed 2d 547 (1976). In that case, the Court struck down a job requirement which forced employees of the county sheriff to belong to the political party of the sheriff in office. The Court applied strict scrutiny to invalidate the requirement as an impermissible infringement on First Amendment rights except as applied to policy-making employees. However, the application of strict scrutiny in *Elrod* can be traced to typical affirmative (as opposed to negative) speech and association concerns. The sheriff's employees could not choose to belong to the opposing political party and keep their jobs. As further analysis will show, such a restriction on protected affirmative exercises is not present on the facts of the case at bar.

[14] A plurality of the Court came to that decision without relying on an infringement of the Free Exercise Clause of the First Amendment. 319 US 635, 642 (opinion of Jackson, J.).

ered the motto with tape, they were cited for a misdemeanor. Eventually, the Maynards sued in federal court to enjoin enforcement of the misdemeanor statute on First Amendment grounds.

The Court held that the Maynards had a protected right to remain silent and to refuse to be associated with the message behind the motto:

"We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrian from speaking at all. See *West Virginia State Bd of Ed v Barnette*, 319 US 624, 633-634; 63 S Ct 1178; 87 L Ed 1628 (1943); *id.*, p 645 (Murphy, J., *concurring*). A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.' *Id.*, p 637." 430 US 714.[18]

The next case dealing with negative First Amendment interests was *Abood v Detroit Bd of Ed*, 431 US 209; 97 S Ct 1782; 52 L Ed 2d 261 (1977). Plaintiff Falk relies heavily on this case to support his challenge. The opinions of Justices RYAN and WILLIAMS in *Falk I* agreed that *Abood* controlled the issues raised here, but disagreed concerning the standard of review called for by that case.

Abood involved a challenge by public school teachers to a statutorily mandated union shop provision of their collective-bargaining agreement. Non-union teachers were required to pay service fees equal to union dues as a condition of their employment. The teachers maintained that the

[18] As in the *Barnette* plurality, the Court did not rely on the free exercise of religion to support its holding.

exaction of such fees to support the costs of collective bargaining and to support the political activities of the union violated their First Amendment rights.

The Court found that compelling payment of the fees for either purpose implicated First Amendment interests.[18] It upheld the exaction as it related to collective bargaining, but struck down the use of the fees for political and ideological activities unrelated to collective bargaining or contract administration.

The most recently decided case involving negative First Amendment interests is *PruneYard Shopping Center v Robins,* 447 US 74; 100 S Ct 2035; 64 L Ed 2d 741 (1980). That case involved the right of citizens to peacefully distribute political material in a privately owned shopping center. The California Supreme Court held that such a right existed under the California Constitution.

The shopping center owners appealed to the United States Supreme Court, arguing *inter alia* that their First Amendment right of non-association was violated by the California decision, which in effect compelled the use of their property for political expression.

The Court rejected the owners' claim. It distinguished *Wooley* on several grounds. The Court found that because of the character of the property involved, *i.e.,* a public shopping center, reasonable persons would not be likely to connect the political views expressed there with the owners. The Court also noted that the content of the speech permitted was not prescribed by the government and that the owners were free to disavow the views expressed.

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[18] The Court did not reach the teachers' challenge to the use of the fees to support union social activities because of an inadequate record. 431 US 236, fn 33.

Finally, most directly on point for purposes of this case is the United States Supreme Court opinion in *Lathrop v Donohue*, 367 US 820; 81 S Ct 1826; 6 L Ed 2d 1191 (1961). In that case, plaintiff challenged the state's power to require him to belong and pay dues to the Wisconsin State Bar. The plaintiff objected to both the fact of mandatory membership and the use of his mandatory dues for political purposes.

A majority of the Court agreed that Wisconsin had a sufficiently significant interest in maintaining an integrated bar to justify compelling plaintiff's membership. There was no majority view, however, on the political expenditure question. Four members of the Court found that the issue had not been properly raised in the courts below. 367 US 846 (Brennan, J., plurality opinion). However, Justice Harlan, joined by Justice Frankfurter, found the question properly presented and found no First Amendment violation. 367 US 848 (Harlan, J., *concurring*).[17]

C. The Test

While the decisions of the Supreme Court make it clear that under certain circumstances there is a constitutional right to be free from compelled association or expression, the Supreme Court has not clearly articulated a test to be applied to determine the extent of that right.

However, it is clear that the Supreme Court *does not* consider the strict scrutiny applied in other First Amendment cases to be appropriate in cases involving negative First Amendment rights. Even the facts of *Barnette* did not prompt the

[17] Justice Whittaker concurred in the judgment because he believed that no constitutionally protected interest was implicated. 367 US 865. Justices Black and Douglas dissented. 367 US 865, 877.

Court to engage in the traditional test which involves a compelling state interest and the least restrictive regulatory alternative. Because such analysis is conspicuous by its absence from negative First Amendment cases, we are unable to conclude that the Supreme Court would apply it to resolve the case at bar.

However, when examined carefully, the cases discussed above reveal a consistent pattern of analysis. This close examination indicates that in resolving the various claims the Court has balanced the severity of the injury to the individual interest against the magnitude of the government interest sought to be served by the requirement or regulation. In this manner, the Court has decided whether the complained-of government action constitutes an impermissible First Amendment infringement.[15]

"Whenever a government requirement is challenged on the basis that it compels expression the initial inquiry must be whether the requirement does in fact infringe upon negative First Amendment interests and if so how seriously. The judicial task does not end here, however. It is also necessary to consider what government interests may be served by the requirement in question, and under what circumstances advancement of a government interest might outweigh the concomitant infringement of individual negative First Amendment interests." Gaebler, *supra*, p 1014.

The first step in this analysis is a determination whether the asserted claim implicates the First Amendment at all. It is only when the conduct regulated can fairly be characterized as expression that the First Amendment can be cited as a source of protection. Once a determination is made that

[15] See the invaluable analysis contained in Gaebler, *supra*, pp 1006-1014.

the government requirement infringes on a First Amendment interest, the key factor in determining the severity of the infringement is the intimacy of the connection between the individual and the compelled expression. If there is only a very attenuated link between the individual and the compelled expression, the government interest advanced to justify the requirement need not be substantial. This seems to be the import of Justice Harlan's concurring opinion in *Lathrop, supra,* p 858.

Conversely, the more directly the compelled expression relates to the individual, the more important must be the government interest advanced to justify it. For example, in *Barnette,* the government required the individual to salute the flag and verbally pledge national allegiance. A requirement which entails such intimate personal action has a direct impact on the individual's freedom of conscience and constitutes a severe invasion of the protected sphere of intellect and spirit. The individual is required to personally and directly proclaim a belief which is repugnant to him.

The Court in *Barnette* made it clear that some interest much more urgent and immediate than a general interest in national unity would have to be advanced to justify such a First Amendment infringement. 319 US 633. In fact, the Court expressed doubt about whether such an interest might ever exist. 319 US 642.

In *Wooley,* the government intrusion was less personal and direct than in *Barnette.* Being forced to display a personally offensive motto on the license plate of a vehicle requires less intimate expression than does a compulsory pledge of allegiance. Accordingly, the Court in *Wooley* devoted significantly more discussion to the asserted gov-

ernment interests behind the compelled expression. Nevertheless, it found the state interests to be insufficient in relation to the infringement.

In *Abood*, the Court held that First Amendment interests were implicated in compelling non-union teachers to pay service fees equal to union dues. However, the Court found that the government interest in preserving labor peace and the elimination of "free riders"[19] outweighed the infringement. In reaching this conclusion, the Court did not carefully examine the government interest. Arguably, this can be explained as an implicit finding that the infringement of individual interests was not severe. See Gaebler, *supra*, p 1015. Certainly, the same degree of compelled personal expression involved in *Barnette* and *Wooley* was not present in *Abood*. Non-union teachers were asked to support the right of the union to exist only through the relatively indirect method of financial support. The direct relation of the compelled support to the government interest in peaceful collective bargaining justified the infringement.

However, use of government-mandated fees for political or ideological purposes unrelated to collective bargaining was held to be an invalid infringement of a protected interest. The plurality did not specifically explain why this result was necessary. Nevertheless, because the plurality emphasized the absence of a link to collective bargaining, the result seems to turn on the insufficiency of the government interest in this aspect of the compelled contribution.

Justice Harlan engaged in similar analysis in his concurring opinion in *Lathrop, supra*, p 848,

[19] The term "free riders" refers to those who reap the benefits of collective bargaining without bearing a proportionate share of the cost. *Abood, supra*, pp 221-222.

although he arrived at a different result. He found that Wisconsin had a "most substantial state interest" in hearing "the views of the members of its Bar 'on measures directly affecting the administration of justice and the practice of law' ". 367 US 864. He acknowledged that the compelled-expression rationale in *Barnette* was relevant, but distinguished that case as involving a more concrete and intimate expression of belief:

> "What seems to me obvious is the large difference in degree between, on the one hand, being compelled to raise one's hand and recite a belief as one's own, and, on the other, being compelled to contribute dues to a bar association fund which is to be used in part to promote the expression of views in the name of the organization (not in the name of the dues payor), which views when adopted may turn out to be contrary to the views of the dues payor. I think this is a situation where the difference in degree is so great as to amount to a difference in substance." 367 US 858.

Balancing is also implicit in the *PruneYard* case. As discussed above, the Court indicated that the negative First Amendment rights of the shopping center owners were not seriously infringed by the indirect form of compelled expression in that case. Because such a minor injury was involved, the Court paid little attention to the magnitude of the government interest.[30]

In summary, when these cases are considered together, a balancing test for asserted violations of negative First Amendment rights emerges.

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[30] Arguably, the Court believed that there was no First Amendment injury at all:

> "Eventually a point is reached where the level of personal involvement is so minimal and the resulting nexus between the individual and the message so remote that no legally cognizable infringement of negative first amendment interests occurs." Gaebler, *supra*, p 1014.

"In other words, negative First Amendment cases require a sliding scale approach to balancing. The more serious the infringement of individual interests, the more vital the asserted advancement of government interests must be to outweigh the infringement and vice versa. The question in each case must be whether the compelled participation in expression infringes unduly upon individual interests." Gaebler, *supra*, p 1016.

It is this test which should be applied to decide the merits of Falk's objections to the expenditures of his compelled bar dues.

III. THE CONSTITUTIONAL TEST APPLIED

As mentioned in Part I, this Court has not decided the merits of plaintiff's constitutional objections to the following activities of the State Bar: (1) certain activities of the Young Lawyers Section, (2) promotion of prepaid legal services, (3) lawyer placement services, (4) certain activities of the Lawyers Wives, (5) social functions, (6) appearing before the State Officers Compensation Commission, and (7) lobbying and other political activity.

In applying the constitutional test which has been articulated above, it is necessary to further examine the precise nature of plaintiff's objections to these activities.

In connection with the volunteer legal assistance rendered by the Young Lawyers Section, plaintiff argues that such activity is more properly conducted by government and funded by tax revenues. Plaintiff makes a similar argument concerning the lawyer placement services of the bar.

Plaintiff objects to the bar's promotion of prepaid legal services because, as an employee of the public sector, he receives no benefit from such promotion. Similarly, plaintiff objects to the bar's

support of the Lawyers Wives because he is unmarried and receives no benefit from the activity.

In addition, plaintiff objects to the social functions conducted by the bar and its sections and groups because the food and drink served at these gatherings violates his religious beliefs and those of other members of the bar.

Finally, plaintiff objects to the "political" activities of the bar. More specifically, he objects to the participation of the bar in legislative drafting and in more typical lobbying efforts. Additionally, plaintiff challenges the appearance of representatives of the bar at meetings of the State Officers Compensation Commission. Bar representatives appear before the commission to argue on behalf of increased judicial compensation.

We will apply the constitutional test separately to the political and non-political challenges raised by plaintiff.

A. Non-Political Activities

As discussed above, our first task in deciding the negative First Amendment claims raised by plaintiff is to determine if the government requirement infringes upon any negative First Amendment interests. If no infringement has occurred, the inquiry goes no further.

In connection with plaintiff's challenges to non-political activities of the bar, we find that plaintiff has not met his burden of proof in showing an injury to a protected First Amendment interest.[21] Plaintiff has not pointed out to this Court any

[21] We construe plaintiff's complaint and briefs in a light most favorable to him when we view his challenges as based upon asserted First Amendment violations. Plaintiff's arguments based on art 4, § 24 of the Michigan Constitution of 1963 (title-object clause), the Commerce Clause, US Const, art I, § 8, and other constitutional provisions are devoid of merit. See discussion in *Falk I, supra*, pp 141-142 (opinion of WILLIAMS, J.).

aspect of those activities which can fairly be characterized as compelled expression. Indeed, we doubt whether these activities contain any message at all.

In objecting to most of these activities, plaintiff has not argued that his governmentally required dues are being spent in a manner which compels his support of some belief, ideology, or position which is repugnant to him or on which he would prefer to remain silent. Rather, for the most part, plaintiff has argued that his governmentally required dues are spent in a manner which returns no economic benefit to him. If such an argument has a constitutional base, it is not in the First Amendment.

Even if the activities could be characterized as encompassing some ideological content, any asserted connection with plaintiff would be too attenuated to constitute a burden on the freedom of conscience that underlies negative First Amendment protection.

For example, plaintiff's objections to the food and drink served at social functions of the bar could conceivably be framed as an objection to a compelled expression of support for a religious message. However, if such compelled expression is present, it does not have the intimate connection with plaintiff that is necessary for it to reasonably be seen as an invasion of plaintiff's freedom of conscience. Plaintiff is not being forced to consume the food, nor is he being forced to attend the functions at which it is served. Compare *Barnette* and *Wooley, supra.* No reasonable person could attribute a religious message to plaintiff by virtue of the fact that a small portion of his mandatory bar dues is used to purchase pork or shellfish for consumption at cocktail parties sponsored by the

bar. The connection between plaintiff and any conceivable message is simply too attenuated to be protected by the First Amendment. See *Lathrop, supra* (Harlan, J., *concurring),* and *Prune Yard, supra,* pp 87-88.

Alternatively, we find that the non-political activities challenged by plaintiff are fairly within the normal functions of an integrated bar. The concept of an integrated bar was constitutionally validated in *Lathrop.* Thus, the activities discussed here share in that validation. *Cf. Abood, supra,* pp 222-223 (activities which promote the cause which justified bringing the group together are permissible).

We hold therefore that plaintiff has failed to identify a protected First Amendment interest in connection with the use of his mandatory dues to support the non-political activities of the Young Lawyers Section and the Lawyers Wives. In addition, we hold that plaintiff has not shown that bar expenditures used to promote prepaid legal services, to provide lawyer placement services, or to conduct social functions violate his First Amendment rights.

B. Political Activities

Plaintiff's challenge to the use of his mandatory dues in connection with the political activities of the bar requires a more complete application of the constitutional test. Plaintiff objects to several aspects of the political activity of the bar. He objects to the technical expertise which the bar provides to the state Legislature by assisting in drafting legislation and giving advice to the Legislature on the substantive content of the law. Plaintiff also objects to the bar's lobbying activity as conducted in the Legislature and in appearances before the State Officers Compensation Commis-

sion. Specifically, plaintiff claims that when the bar takes a position in support of or opposition to a piece of legislation, it infringes on his negative First Amendment interest to remain silent on that issue.

The first step in the constitutional test is to determine if the government action infringes upon a protected First Amendment interest. Plaintiff has carried his threshold burden of proof in connection with the bar's political activities. The bar's legislative and political involvement clearly involves a message. By rendering advice on content or supporting or opposing legislation, the bar engages in expression. To the extent that plaintiff's mandatory dues are used to support such activity, plaintiff is compelled to participate in such expression. Even if plaintiff is opposed to the bar's position, or would choose to take no position at all, he is forced to contribute to the advancement of the bar's position. His freedom of conscience and intellect have been invaded.

Plaintiff has thus suffered some cognizable First Amendment related injury. It remains to be seen, however, whether plaintiff is protected from that injury in connection with this government activity.

The next step in determining the answer to this ultimate question is to further analyze the nature of plaintiff's injury to determine its severity. As described above, the key factor in this analysis is the intimacy of the connection between plaintiff and the compelled expression.

This is not a case where plaintiff is being forced to personally express his own agreement with the political positions of the bar. Compare *Barnette, supra.* Plaintiff is also not being forced to display the bar-approved message in his home or on his automobile. Compare *Wooley, supra.* Plaintiff is

free to take a public position which is directly opposed to that taken by the bar. See *Prune Yard, supra.* Plaintiff is required only

"to contribute dues to a bar association fund which is to be used in part to promote the expression of views in the name of the organization (not in the name of the dues payor), which views when adopted may turn out to be contrary to the views of the dues payor". *Lathrop, supra,* p 858 (Harlan, J., *concurring).*

Thus, although the government action complained of here has in fact infringed upon plaintiff's First Amendment interests, the severity of the injury is not great. Plaintiff is required to support the legislative positions taken by the bar only through indirect financial contributions. Reasonable persons are not likely to associate the bar's expressed position with plaintiff merely because he is forced to pay dues to the bar in order to practice law. Thus, the invasion of plaintiff's freedom of conscience and sphere of intellect occasioned by the bar's political activity is, in reality, not great.

Our next task is to weigh the government's interest in the bar's political activity to determine whether it outweighs this First Amendment injury. There can be little doubt that the government has an interest in receiving the input of the State Bar into the legislative process. The State Bar is, of course, made up of lawyers whose business necessarily entails knowing, understanding, utilizing, and interpreting the law.

In this sense, the State Bar is quite different from the labor union involved in *Abood.* It is true that the government might have a keen interest in the legislative participation of a labor union in specialized areas of the law touching directly on

the field of employment of the union members or on the area of collective bargaining. But lawyers are involved with the law in almost all its forms. Therefore, their input is of broader interest to the Legislature.

In addition, the bar brings its collective experience in working with the law to the lobbying efforts and technical advice which it offers the Legislature. Certainly, the Legislature is greatly aided by the collective wisdom of the practitioners who make up the Taxation Section of the bar when it revises state taxation provisions. Similarly, the input of the Criminal Law Section is invaluable to the Legislature in its task of revising Michigan's Criminal Code.

In addition, the government has an interest in hearing the collective majority opinion of the bar on the matter of judicial compensation. Members of the bar are best able to inform the State Officers Compensation Commission what level of compensation is required in order to attract and keep qualified lawyers on the bench.

State Bar Rule 1 provides:

> "The state bar of Michigan shall, under these rules, aid in promoting improvements in the administration of justice and advancements in jurisprudence, in improving relations between the legal profession and the public, and in promoting the interests of the legal profession in this State." 340 Mich xxxviii.

The political lobbying and input currently conducted by the State Bar of Michigan clearly serves those purposes.

As the foregoing discussion indicates, the government has a substantial interest in the political activity of the bar. Although this activity infringes upon plaintiff's negative First Amendment inter-

ests, we believe the government interest in the activity outweighs plaintiff's injury. We therefore hold that the State Bar of Michigan may constitutionally use the mandatory dues of its members to support the lobbying and other legislative activities of the State Bar as they are currently conducted.

IV. CONCLUSION

Plaintiff has failed to establish his right to relief in connection with any of the undecided constitutional challenges raised by his complaint and briefs. Therefore, plaintiff's request for relief is denied.

No costs, a public question being involved.

WILLIAMS, C.J., concurred with BOYLE, J.

KAVANAGH, J. Justice LEVIN expressed our view in *Falk v State Bar,* 411 Mich 63, 166-167, fn 1; 305 NW2d 201 (1981):

"Falk commenced this action as an original proceeding in this Court denominating it 'Petition for Special Relief'. No statute or court rule expressly authorizes such a petition. If the petition were an ordinary lawsuit claiming violations of Falk's constitutional rights, it should have been filed in a circuit court. If regarded as an action for a writ of mandamus against a state officer, it should have been commenced in the Court of Appeals, or the circuit court for Ingham County or other county in which venue was proper. MCL 600.4401; MSA 27A.4401. This Court has elected to treat Falk's petition as a request to exercise the Court's statutory power to regulate the conduct and activities of the bar. MCL 600.904; MSA 27A.904.

"As such, this proceeding is more in the nature of a rule-making proceeding than a lawsuit; what character it has as a lawsuit is the result of this Court's action in

appointing a judge to conduct a hearing and make findings of fact.

"Since this is not a lawsuit, or even an action whose procedure is delineated by statute, court rule or precedent, it is inappropriate to limit our consideration of the issues presented in this proceeding according to the rules circumscribing lawsuits. To determine the scope or content of an order regulating the bar according to burdens of proof or inadequate showings in the record we ordered would be to treat this proceeding as the lawsuit it clearly is not."

While we are edified by the scholarly opinions of our colleagues, we are still persuaded that we should await a proceeding wherein it is necessary for decision to reach the constitutional issues. Accordingly, we express no opinion thereon, but wholeheartedly join in the Court's disposition of this proceeding.

LEVIN, J., concurred with KAVANAGH, J.

RYAN, J. In our previous consideration of this case,[1] we examined the extent to which an individual attorney may be required, over his First Amendment[2] objections, to pay dues to and associate himself with the integrated State Bar of Michigan. Three opinions resulted, but there was no majority for final disposition of the case.

Two members of the Court, Justice WILLIAMS and Chief Justice COLEMAN, were of the opinion that the plaintiff was entitled to no relief and would have denied his petition. Justices LEVIN and KAVANAGH were of the opinion that, while some of

[1] *Falk v State Bar of Michigan*, 411 Mich 63; 305 NW2d 201 (1981).

[2] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." US Const, Am I.

the issues before the Court might have been resolved on the record as presented, others required further factual development. In an opinion signed by Justice FITZGERALD and the late Justice MOODY, I expressed the view that, while the plaintiff was entitled to partial relief and that such relief should have been ordered, several issues could not be decided without further factual development. While Justice LEVIN and I differed as to specific bar association activities which needed further record explication, a majority of the justices agreed that the matter should be remanded to the Honorable James H. Lincoln for an evidentiary hearing to develop a more complete record with regard to the following activities of the bar association:

"(1) the Young Lawyers Section and Lawyers Wives,
"(2) the Lawyer Placement Service,
"(3) the commercial sale of the bar's mailing list, and
"(4) bar activities addressed to influencing legislation." 411 Mich 63, 83; 305 NW2d 201 (1981). (Numeration added.)

Extensive hearings were held for 12 days between August 24, 1981, and December 18, 1981. Eighty-three witnesses testified and numerous exhibits were introduced. Since we have the benefit of a supplemental record, we may now dispose of the originally stated issue.

Upon careful examination of the record as augmented, and after reconsideration of our prior opinions as well as the briefs and arguments of the parties, we adhere to my previous opinion and the holding therein that:

"The State of Michigan, through the combined actions of the Supreme Court, the Legislature, and the

State Bar, may compulsorily exact dues, and require association, to support only those duties and functions of the State Bar which serve a compelling state interest and which cannot be accomplished by means less intrusive upon the First Amendment rights of the objecting individuals affected." *Id.*, p 84.

Before addressing the particular activities for which a remand was made, a brief summary of the facts and my previously expressed views is in order.

I

Plaintiff Allan Falk filed a pleading in this Court on November 30, 1977, entitled "Petition for Special Relief", naming the State Bar of Michigan as defendant, thereby initiating an original proceeding in this Court. He claimed that many of the expenditures of the State Bar of Michigan, to which he must belong and pay dues, violated his First Amendment rights. I found it uncontroverted that the State Bar financed, in varying measure, certain bar activities to which the plaintiff objected, including legislative lobbying, the Prepaid Legal Services program, the Lawyer Referral Service programs, the Lawyer Placement Service, and the Client Security Fund.

After analyzing several decisions of the United States Supreme Court, I concluded that the result in *Abood v Detroit Bd of Ed*, 431 US 209; 97 S Ct 1782; 52 L Ed 2d 261 (1977), provided the constitutional framework for the views I expressed. *Abood* was read as holding:

"(1) that, as in *Hanson [Railway Employees' Dep't v Hanson*, 351 US 225; 76 S Ct 714; 100 L Ed 1112 (1956)], the State of Michigan's authorization of agency shop agreements in the public sector served a sufficiently

compelling state interest in the achievement of labor stability to permit impingement on public employees' First Amendment rights to the extent of requiring payment of service fees for purposes germane to the collective bargaining duties of the teachers' union; and (2) that to the extent that agency fees were exacted and used for purposes beyond or apart from those activities related to collective bargaining, the plaintiffs had stated a claim upon which relief could be granted under the First Amendment." 411 Mich 105. (Footnote omitted.)

Unfortunately, *Abood* failed to clearly indicate its analytical basis, depending more on its similarity to earlier decisions than on a particular test. Consequently, I relied upon *Elrod v Burns*, 427 US 347; 96 S Ct 2673; 49 L Ed 2d 547 (1976), which clearly employed the traditional "less intrusive means" balancing approach, applying it to the First Amendment area of freedom of association and freedom of belief, both of which were also implicated in *Abood*, 411 Mich 111. Under this test, First Amendment values may be impinged upon only when the infringement serves a compelling state interest which cannot be accomplished by less intrusive means.

After an explication of the relevant principles of law and consideration of the record presented, the opinion concluded with specific findings of fact and conclusions of law. Of signal importance was the finding that "the regulation of the practice of law, the maintenance of high standards in the legal profession, and the discharge of the profession's duty to protect and inform the public are * * * purposes in which the State of Michigan has a compelling interest" justifying "unavoidable intrusions on the First Amendment rights of objecting attorneys". 411 Mich 114.

I also concluded that the State of Michigan had shown a compelling state interest in certain func-

tions of the bar which could not be advanced by less intrusive means. These consisted of all regulatory activities, all continuing legal education activities, the publication of the Michigan Bar Journal *to the extent* it is devoted to informing members on current matters related to regulation of the profession and the improvement of professional standards, the Client Security Fund, activities designed to educate the public concerning the use of legal services and the relationship between individuals and the legal system generally, and activities designed to make legal services more accessible such as the Lawyer Referral Service and legal aid organizations.

On the other hand, the political and legislative activities of the bar were held to be impermissible intrusions upon First Amendment rights. Legislative or policy choices are the result of ideological beliefs, and such beliefs, and association to promote or oppose such beliefs, are essential values protected by the First Amendment. Given the alternatively "less intrusive" methods available to the Legislature to obtain expert legal advice, such functions were held not to serve a state interest identified as compelling.[3]

Similarly, activities designed to further the commercial and economic interests of the members of the bar were found to be improper, since they do not serve compelling state interests such as those identified. Thus, activities such as lawyer placement were held to violate the plaintiff's First Amendment rights.

Nothing which has been presented in the supple-

[3] For example, just as it is inappropriate for the State Bar to adopt and publish an official position on proposed legislation, it is also improper for it to devise legislation and arrange to have it proposed. Our prior disapproval of a professional lobbyist would imply this result as well.

mental record, or advanced in the briefs and oral arguments, or discovered upon reconsideration of my colleagues' written opinions has persuaded me to alter my original views, and they are, therefore, reaffirmed.

We find it unnecessary and unproductive to examine in this opinion every activity of the State Bar, including those of the bar's numerous committees, to determine whether they serve a compelling state interest in an unavoidably intrusive manner. Rather, we rely upon my earlier comments on the inappropriateness of political and legislative activities and those designed to promote commercial and economic interests, as opposed to those serving an educative or regulatory function as previously identified, to provide sufficient standards to determine whether specific bar activities pass or fail the petitioner's First Amendment challenge.

Attention is particularly invited to findings and conclusions Nos. 10 and 11 of my prior opinion, 411 Mich 116-118, wherein two of the bar activities which my colleagues thought required further evidence and record explication, the political and legislative activities of the bar and the Lawyer Placement Service, were discussed and found to be constitutionally unsustainable.

However, we will specifically examine those activities enumerated in the Court's remand order which have not already been addressed.[4] Given the supplemental record, we conclude that:

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[4] It is also unnecessary for us to address all of plaintiff's arguments. Some have already been discussed and others have been answered implicitly.

For example, plaintiff objects to unpaid solicitations in the Michigan Bar Journal for LAWPAC (Lawyers Political Action Committee), the political arm of the State Bar of Michigan. He sees it as a "backdoor method of using compulsory dues" to finance LAWPAC. We agree that such a use of the Bar Journal is improper. This conclusion logically follows from our disapproval of political and

The Bar's Mailing List

1. The parties have agreed and we find that the issue concerning the commercial sale of the bar's mailing list is moot. The State Bar offers members the opportunity to remove their names from the mailing list being used for commercial purposes. No right of privacy or First Amendment issue need be decided.

The Young Lawyers Section

2. Although membership in the Young Lawyers Section is still "automatic" by virtue of age or years since admission, the State Bar clearly gives notice to all members upon admission, and periodically in the Bar Journal and in Inter Alia, the Young Lawyers Section publication, that they may disassociate themselves. We agree that the issue of *compelled* membership in the Young Lawyers Section is, therefore, likewise moot and need not be examined further.

Because the bar provides a measure of financial support to the Young Lawyers Section, however, its activities must be examined under the same principles as any bar activity. Here we specifically adopt Judge Lincoln's finding. Those activities that are legislative or political, or designed primarily to further the economic opportunities of "young" lawyers, are impermissible. In particular, those activities of the State Bar Juvenile Law Committee which include, among other things, rendering advice to the House of Representatives and proposing enactment of a revised juvenile code are politi-

legislative activities by the bar, 411 Mich 116, as well as our approval of the Bar Journal as a bar activity when *limited* to matters on regulation of the profession and the improvement of professional standards. *Id.*, p 115.

cal or legislative in nature.[8] On the other hand, purely educative activities by the Child Advocacy Committee are "directed to the maintenance of high professional standards among Michigan attorneys" and, as such, are not prohibited. 411 Mich 115.

The funding of Prison Legal Services of Michigan, Inc., which provides free legal counsel to Michigan prisoners in civil matters, as well as the Committee for Provision of Legal Services to the Elderly, are activities designed to make legal services more accessible. As indicated originally, "[t]hese activities represent a part of the service every attorney owes the public and hence compelling support for them cannot be deemed constitutionally obnoxious". *Id.*, p 116.

One final activity of the Young Lawyers Section that cannot be continued as presently conducted is the Prepaid Legal Services Committee. To some extent, promotion and development of such plans make legal services more accessible and promote the discharge of the profession's duty to protect and inform the public. Yet, the plans differ in a constitutionally significant way from the Lawyer Referral Service or the service of the legal aid organizations. Prepaid legal service plans benefit a narrow category of individuals; only those who can afford such a plan and who have contracted for it may use its services. The Lawyer Referral Service, however, benefits any member of the public who

[8] In addition to the testimonial record and exhibits produced at the hearing upon remand, we have considered the summary of the testimony by plaintiff Falk which was submitted in his brief on reargument as his Statement of Facts. Plaintiff's brief was filed long before defendant's, yet defendant failed to file a counter-statement of the facts or to contest the summary. See GCR 1963, 814.2, 854. Thus, defendant is taken to have accepted plaintiff's summary. Our acceptance of plaintiff's statement, however, does not imply acceptance of any opinions or conclusions which might have been incorporated in the summary.

requests the name of a lawyer. Any citizen who is in need of legal advice can contact the referral service, but he can avail himself of the prepaid plan only if he has a contract for such services.

Prepaid legal service plans differ from legal aid not in the number of potential beneficiaries, but in the cost of services. Legal aid is charitable in character; legal service plans are designed as profit-making enterprises. The distinguished chairman of the Prepaid Legal Services Committee testified that he became involved in the bar program to promote and develop prepaid legal service plans out of fear of losing clients to automobile manufacturers and labor union prepaid service plans—out of fear of losing income. Such plans are primarily designed to further the altogether legitimate economic interests of lawyers, despite the incidental benefit of making legal services more accessible to the middle class. Since prepaid legal service plans are designed *primarily* to further lawyers' economic interests rather than make legal services more accessible to the public in general, or those without money, they serve no compelling state interest.

Lawyers Wives of Michigan

3. The State Bar asserts that the Lawyers Wives of Michigan, as an adjunct to the State Bar, is designed to "educate the general public concerning the use of legal services and the relationship between individuals and the legal system generally". 411 Mich 115. The supplemental record indicates that the activities of the Lawyers Wives organization include art exhibits, essay contests, brochures, publications such as "You and the Law", and Law Day activities designed to promote public education. The mere fact that Law Day may be a

substitute for International Labor Day ("Red May Day") and thus may have political overtones is unsubstantiated and, in any event, irrelevant. Law Day activities are designed to educate the public about our legal system, not incite rebellion. Consequently, under the standard quoted above, the Lawyers Wives organization is a constitutionally permissible activity.

4. All the activities for the consideration of which remand was ordered have been examined by this Court either in my previous opinion or in this one.

Consequently, we would grant the relief as announced in my original opinion, but modified to take account of the final character of the disposition of the case. We would order:

a. That the State Bar be enjoined from disbursing compulsorily exacted dues for any functions or purposes other than those described in findings and conclusions No. 9A to 9F of my prior opinion, 411 Mich 114-116, and conclusions Nos. 2 and 3 above, and that the bar poll its members to identify those willing to support such other activities on a voluntary basis and permit solicitation of contributions from those members for such purposes.

b. That the State Bar of Michigan determine the proportion of dues paid by each member which does not relate to the above-declared and aforementioned constitutional purposes and functions, and that the amount of dues as of and after October 1, 1983, the beginning of the fiscal year of the State Bar of Michigan be reduced accordingly.

c. That plaintiff Allan Falk be advised of the portion of his excused bar dues which relates to the purposes of the State Bar described in findings and conclusions No. 9A to 9F of our first opinion,

411 Mich 114-116, and conclusions Nos. 2 and 3 above, and that he pay to the State Bar that amount within 30 days after he is so notified.

BRICKLEY and CAVANAGH, JJ., concurred with RYAN, J.

FIRST OPINION
State of Michigan
In the Supreme Court

ALLAN FALK -v- STATE BAR OF MICHIGAN

PER CURIAM. This matter comes before this Court pursuant to plaintiff's "Petition for Special Relief". In his petition the plaintiff sets forth his objections to a number of State Bar activities and asks that the petition "be granted".

Based on the record we have before us, three members of the Court are of the view that the plaintiff is entitled to partial relief and would order it to be afforded. Several issues, however, cannot be decided without further development.

Two members of the Court are of the opinior

that the plaintiff is not entitled to relief and would deny the petition.

Two members of the Court are of the view that further hearings on this matter are required, believing that the present state of the record is such that while some of the issues could be resolved based upon an evaluation of the record, several other issues should not be decided without further development.

In light of these circumstances, there being no majority of the Court at this time for a decision which would determine this matter, we order that the Honorable James H. Lincoln be appointed to conduct an additional evidentiary hearing. At this hearing the parties shall further develop the record with regard to the following bar activities: the Young Lawyers Section and Lawyers Wives,[1] the Lawyer Placement Service, the commercial sale of the bar's mailing list, and bar activities addressed to influencing legislation.

The hearing on remand shall be concluded not later than July 31, 1981 and the transcript thereof filed with the Clerk of this Court within 60 days after conclusion of the hearing. Thereafter the plaintiff shall file any additional brief he wishes to present for consideration within 30 days of the filing of the transcript and the State Bar shall file any responsive brief within 60 days of the filing of the transcript.

A majority of the Justices are in favor of the action directed by this opinion. All of the Justices agree that, there being a majority for this action, an order to effectuate these directions shall be issued.

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[1] No further evidence need be taken with regard to the preparation and distribution of the Juror's Manual, the distribution of the "You and the Law" booklet, and funding of the Children's Charter.

COLEMAN, C.J., and KAVANAGH, WILLIAMS, LEVIN, FITZGERALD, RYAN, and BLAIR MOODY, JR., JJ., concurred.

RYAN, J. The issue in this case is:

To what extent, if any, may this state, through the combined actions of the Supreme Court, the Legislature, and the State Bar, compulsorily exact dues for, and require association in, an integrated bar organization over the First Amendment[1] objections of an affected individual attorney?

We would hold:

The State of Michigan, through the combined actions of the Supreme Court, the Legislature, and the State Bar, may compulsorily exact dues, and require association, to support only those duties and functions of the State Bar which serve a compelling state interest and which cannot be accomplished by means less intrusive upon the First Amendment rights of the objecting individuals affected.

I. FACTUAL BACKGROUND

A

This case was commenced as an original proceeding in this Court on November 30, 1977 when plaintiff attorney Allan Falk filed a pleading entitled "Petition for Special Relief" which named the State Bar of Michigan as the defendant.

The plaintiff's petition is a three-page document which sets forth a series of factual allegations and

[1] The First Amendment of the United States Constitution provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

legal assertions expressing his First Amendment objections to various activities and expenditures of the State Bar of Michigan, to which he must belong and pay dues. While Mr. Falk brings an unusual, and relatively complex, claim to this Court, we find that his petition bears at best only a remote resemblance to a complaint under our court rules, GCR 1963, 101, 111. The petition certainly contains allegations that various activities and expenditures of the State Bar violate the plaintiff's First Amendment rights.[2] However, we are unable to discern the statement of any other claim or cause of action.[3] Further, the demand for

[2] Mr. Falk's petition makes reference to the United States Supreme Court's decision in *Abood v Detroit Board of Education*, 431 US 209; 97 S Ct 1782; 52 L Ed 2d 261 (1977), *reh den* 433 US 915; 97 S Ct 2989; 53 L Ed 2d 1102 (1977).

[3] Mr. Falk's briefs include discussion and argument relating to a tortious invasion of his privacy which he contends is caused by the State Bar's alleged distribution of its membership lists, with addresses, to various commercial entities for use in mail solicitation efforts.

Mr. Falk's original pleading nowhere states a claim, or requests relief, for tortious invasion of privacy. See GCR 1963, 111.1, 117.2(1). Adequate proofs were not presented to the fact-finder on such a claim. Further, at oral arguments, Mr. Falk acknowledged that he had never requested the State Bar to refrain from so distributing his name and address.

Since we find that no claim was pled for invasion of privacy, no relief requested, and inadequate proofs offered, we will not reach the issue, and we intimate no opinion as to its merit, if any.

Similarly, Mr. Falk's brief discusses an asserted violation of his First Amendment rights to religious freedom under the following heading:

"The use of State Bar dues monies to purchase alcoholic beverages, pork and shellfish for consumption at social functions, particularly when not all State Bar members are invited to such functions or offered alternatives of equal value for dues paid, and which are unnecessary to the accomplishment of any goal central to the viability of the State Bar as a regulatory body, violates the rights of petitioner and other State Bar members under the free exercise and establishment of religion clauses of the First Amendment."

Mr. Falk characterizes the referenced State Bar social functions as "bacchanalian revelries" which are unnecessary to the furtherance of the constitutionally permitted objectives of the State Bar.

Here again, the petition neglects to state any claim, or seek any

judgment or relief (see GCR 1963, 111.1[3]) requests only that the "petition for special relief be granted".[4] We treat the petition as a complaint for a writ of superintending control over the State Bar of Michigan, within our original jurisdiction pursuant to GCR 1963, 851(6); MCL 600.215, 600.219; MSA 27A.215, 27A.219. We further interpret the petition as seeking an order from this Court relieving the plaintiff of the obligation of paying the pro rata portion of his State Bar dues which relates to alleged "unlawful and unconstitutional activities".

Our role under these unusual circumstances is comparable to that of a trial court, responsible for making the appropriate factual determinations

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relief, for violation of the plaintiff's First Amendment religious freedoms. For that reason, and also because we are satisfied that our disposition of this case renders moot the freedom of religion issues intimated by Mr. Falk, we do not reach the merits of those asserted First Amendment infringements.

[4] Mr. Falk's briefs, but not his petition, also request that all members of the State Bar be notified, through the State Bar Journal, of their right to "opt into" this lawsuit and obtain like relief. The pendency of this action has been reported in the Michigan State Bar Journal. See 57 Mich State Bar J 224-225 (March, 1978). As of the date of the issuance of this opinion, no other member of the State Bar has "opted into" this suit. See GCR 1963, 209.

Mr. Falk, again in his briefs, and not his pleading, further requests that he be granted an attorney's charging lien on all of the dues that might be refunded in this action. It appears from the record that Mr. Falk has been excused of his obligation to pay any bar dues during the pendency of this action. This fact, coupled with the absence of any intervening plaintiffs, combine to result in the generation of no pool of bar dues refunds upon which such a lien could be imposed. Instead, our decision today requires Mr. Falk to pay that portion of his excused bar dues which relates to the constitutional purposes of the bar.

It should also be noted that this action was filed by Mr. Falk solely on his own behalf. He has expressed his belief that a Michigan Court of Appeals decision, *Ball v Detroit*, 84 Mich App 383, 398; 269 NW2d 607 (1978), authoritatively precluded the filing of an original class action in this Court in this case. Because of Mr. Falk's decision to not so proceed, we are not presented with any issue relating to the applicability of the Court of Appeals *Ball* decision in this action, and we therefore intimate no opinion as to the correctness of the plaintiff's understanding of *Ball*.

and applicable conclusions of law in reaching a judgment resolving the claims presented.

Subsequent to the filing of Mr. Falk's petition, this Court entered an order appointing former Judge Maurice E. Schoenberger to conduct a hearing and make findings of fact on the issues presented in this case. 402 Mich 960 (1978).

On June 5 and 6, 1978, the hearing was held, and both parties presented testimony relating to the various activities and functions of the State Bar. A transcript of the hearing is part of the present record. On September 29, 1978 Judge Schoenberger submitted his report to this Court. The report summarizes the presentations of the State Bar and Mr. Falk, lists the exhibits received into evidence at the hearing, and concludes that there are no controverted factual matters which require resolution.

Thereafter, plaintiff Falk filed a brief, a reply brief, and a supplemental reply brief. The defendant State Bar filed a brief in opposition and a motion to file an answer to plaintiff's supplemental reply brief which contained the answering brief. All of this material has been considered by this Court. Finally, pursuant to our order of April 6, 1979 oral arguments were heard on June 5, 1979. 406 Mich 1117 (1979).

A review of the record establishes certain salient facts relating to plaintiff Falk's claim. One of those uncontroverted facts is that the State of Michigan, through the combined actions of this Court, the Legislature, and the State Bar, compels all licensed attorneys to associate in and provide financial support for the integrated State Bar. Another uncontroverted fact is that the State Bar engages in various lobbying efforts in the Legislature, and that such efforts are financed, at least in part, by

the compulsorily exacted dues of the Bar's members. It is likewise undisputed that compulsory bar dues are used to finance other activities which plaintiff contends are non-regulatory in nature, such as the Prepaid Legal Services programs, Lawyer Referral Service programs, the Lawyer Placement Service, and the Client Security Fund.

B

The integrated State Bar of Michigan was legislatively authorized by 1935 PA 58.[5] Thereafter, this Court, in cognizance of the legislation and pursuant to its own inherent power to regulate the practice of law in this state,[6] entered an order

[5] That act provided, in its entirety:

"AN ACT to create the state bar of Michigan; and to authorize the supreme court to provide for the organization, regulation and rules of government thereof.

"The People of the State of Michigan enact:

"Sec. 1. There is hereby created an association to be known as the state bar of Michigan, the membership of which shall consist of all persons in the state now or hereafter regularly licensed to practice law in this state.

"Sec. 2. The supreme court is hereby authorized to provide for the organization and regulation of the state bar of Michigan; to provide rules and regulations concerning the conduct and activities of the association and its members; the schedule of membership dues therein, which dues shall not exceed five dollars per annum, nonpayment of which shall be ground for suspension, the ethical standards to be observed in the practice of law, and the discipline, suspension or disbarment of association members. Under such regulations and restrictions as the supreme court may prescribe, the power of subpoena may be conferred upon the association or its officers and committees for the purpose of aiding in the cases of discipline, suspension or disbarment; the rules promulgated by the supreme court and the proceedings and records of the state bar association to be published by the judicial council of Michigan and in the Michigan reports and advance sheets thereof."

See also 1947 PA 34; 1948 CL 601.48, 601.61, 691.51, 691.52; 1961 PA 236, §§ 901, 904; MCL 600.901, MSA 27A.901; MCL 600.904; MSA 27A.904.

[6] See const 1963, art 6, § 5; *In the Matter of Mills, an Attorney*, 1 Mich 392, 393-394 (1850); *In re Hartford*, 282 Mich 124; 275 NW 791 (1937); *In re Schlossberg v State Bar Grievance Board*, 386 Mich 389, 395; 200 NW2d 219 (1972).

organizing, and promulgating rules concerning, the integrated bar.

Section 1 of the first Supreme Court Rules Concerning the State Bar provided:

"The State bar of Michigan is the association of the members of the bar of this State, organized pursuant to powers of the Supreme Court over the bar of the State. The association shall, under these rules, aid in the promotion of improvements in the administration of justice and the advancement of the science of jurisprudence, in the improvement of the relations between the profession and the public, and in the promotion of the interests of the legal profession in this State."[8]

This original declaration of the purposes of the integrated bar has not been materially altered by any restatement in the subsequent 44 years.[9]

At all times since the formation of our integrated State Bar, all actively practicing lawyers in this state have been required to be members of,[10] and pay dues to,[11] that organization.

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[7] 273 Mich xxxv (1935).

[8] *Id.*

[9] See 340 Mich xxxviii (1954) for the text of current State Bar Rule 1.

It is here worthwhile to consider the analysis of the integrated bar's purposes which was expressed by its first president, Roberts P. Hudson, in his "message from the President" which appeared in 15 Mich State Bar J 7-8 (1936):

"Your organization is designed not only for the benefit and betterment of its members, but primarily for the public at large who require the services of the profession. It must never be subservient to political dictation or intimidation, nor control from outside its membership. It cannot represent the interests of any group or political faith. It must not draw distinctions of color, race or creed. It must not submit to politically minded leadership. It must not stand aloof from its membership. It must purge itself of the unfit. It must not recognize geographic boundaries. It is now and must remain democratic, independent and representative of the best ideals of citizenship."

[10] Supreme Court Rules Concerning the State Bar of Michigan, §§ 2 and 3; now State Bar Rules 2, 3.

[11] Supreme Court Rules Concerning the State Bar of Michigan, § 4; now State Bar Rule 4.

There can be no question that since 1935 the privilege of practicing law in this state has been conditioned upon association with, and financial support of, the integrated State Bar of Michigan compelled by the state.

II. RELEVANT UNITED STATES SUPREME COURT DECISIONS

Our analysis of Mr. Falk's claim under the First Amendment is controlled, of course, by the applicable decisions of the United States Supreme Court. We therefore here undertake the task of presenting our understanding of certain United States Supreme Court decisions which are implicated by Mr. Falk's claims and the State Bar's response.

A. Hanson, Street, and Lathrop

In *Railway Employes' Dep't v Hanson*, 351 US 225; 76 S Ct 714; 100 L Ed 1112 (1956), non-union employees of a railroad brought suit in a Nebraska state court against the railroad and various unions representing the railroad's employees seeking to enjoin anticipated enforcement of a union shop[12] agreement entered into between the railroad and the unions. The contract required that all employ-

[12] A union shop agreement requires that all affected employees must actually join the union, maintain their membership, and pay union dues, as a condition of their employment.

An agency shop agreement is one under which affected employees are not required to actually become members of the union, but are required to pay "service fees" bearing a relationship to union dues to help defray the collective bargaining costs of the agent-union which acts as the exclusive bargaining agent of all affected employees, union members and non-members alike. See, generally, 48 Am Jur 2d, Labor and Labor Relations, §§ 12-20, 355-356, 361; pp 86-93, 273-275, 278-279; 48A Am Jur 2d, *id.*, § 1904, p 324. See also *Abood v Detroit Board of Education*, *supra*, 431 US 217, fn 10.

ees of the railroad become members of the specified union as a condition of their employment.

The union shop agreement was permissively authorized by the Federal Railway Labor Act. That act authorized union shop agreements "notwithstanding the law of 'any State'". 351 US 228.

The Nebraska state constitution contained a "right to work" provision which outlawed union shop agreements.

The Nebraska trial court enjoined enforcement of the agreement. The Nebraska Supreme Court affirmed, holding that the union shop agreement violated the First Amendment in that it deprived employees of their freedom of association, and violated the Fifth Amendment,[13] in that it required members of the union to pay for activities above and apart from the costs relating to collective bargaining. The Nebraska Supreme Court concluded that the relevant provisions of the Railway Labor Act were unconstitutional under the Federal constitution, and therefore did not supersede the Nebraska state constitution's right to work provision. 160 Neb 669; 71 NW2d 526 (1955).

The United States Supreme Court, in an opinion authored by Justice Douglas, reversed. While the Court's decision in *Hanson* has been accorded varying interpretations in later cases, we believe that *Hanson* narrowly held: (1) that Congress' bare authorization of union shops was within the consti-

[13] US Const, Am V provides:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

tutional realm of legislative policy making under the Commerce Clause,[14] in pursuit of labor peace; and (2) that the *Hanson* record did not present any concrete, justiciable First Amendment issues relating to the union shop agreement's potential impairment of freedom of expression or forcing of ideological conformity, since the action had been commenced before the effective date of the agreement.[15] 351 US 238.

In *International Ass'n of Machinists v Street*, 367 US 740; 81 S Ct 1784; 6 L Ed 2d 1141 (1961), a union shop agreement entered into under the Railway Labor Act was challenged by objecting railroad employees.

The employees brought an action in a Georgia state court alleging that substantial portions of their compulsory union dues were being used to finance the campaigns of political candidates, and to advance the propagation of political and economic doctrines to which the plaintiffs were opposed. The agreement in *Street* was in effect at the time the action was brought and a concrete record was therefore presented.

The state trial court entered a judgment for the plaintiffs, enjoining enforcement of the agreement to the extent that it permitted the use of dues for political purposes and the propagation of ideologies which the plaintiffs opposed.

The Georgia Supreme Court affirmed. 215 Ga 27; 108 SE2d 796 (1959).

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[14] US Const, art I, § 8, cl 3.

[15] Of interest in Justice Douglas' *Hanson* opinion is the following statement:

"On the present record, there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar." 351 US 238.

Justice Douglas later disavowed the analogy. *Lathrop v Donohue*, *supra*, 367 US 879. See also *Abood v Detroit Board of Education*, *supra*, 431 US 246, fn 1 (Powell, J., concurring).

On appeal, the United Stated Supreme Court, in an opinion by Justice Brennan signed by four Justices, with two additional Justices concurring in the decisional analysis, reversed and remanded for further proceedings.

Justice Brennan's opinion considered the *Hanson* decision at length. The inadequacy of the *Hanson* record with respect to the justiciability of the possible First Amendment issues was emphasized. *Hanson* was read as only reaching the facial constitutionality of the Railway Labor Act's authorization of union shop agreements:

"In their brief in this Court the appellees in Hanson argued that First Amendment rights would be infringed by the enforcement of an agreement which would enable compulsorily collected funds to be used for political purposes. But there was nothing concrete in the record to show the extent to which the unions were actually spending money for political purposes and what these purposes were, nothing to show the extent to which union funds collected from members were being used to meet the costs of political activity and the mechanism by which this was done, and nothing to show that the employees there involved opposed the use of their money for any particular political objective. In contrast, the present record contains detailed information on all these points, and specific findings were made in the courts below as to all of them. When it is recalled that the action in Hanson was brought before the union-shop agreement became effective and that the appellees never thereafter showed that the unions were actually engaged in furthering political causes with which they disagreed and that their money would be used to support such activities, it becomes obvious that this Court passed merely on the constitutional validity of § 2, Eleventh of the Railway Labor Act on its face, and not as applied to infringe the particularized constitutional rights of any individual. On such a record, the Court could not have done more, consistently with the re-

straints that govern us in the adjudication of constitutional questions and warn against their premature decision. We therefore reserved decision of the constitutional questions which the appellees present in this case. We said: "It is argued that compulsory membership will be used to impair freedom of expression. But that problem is not presented by this record * * * if the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case. For we pass narrowly on § 2, Eleventh of the Railway Labor Act. *We only hold that the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or the Fifth Amendments.*" *Id.* 351 US 238. See, also, 351 US 242 (concurring opinion). *Thus all that was held in Hanson was that § 2, Eleventh was constitutional in its bare authorization of union-shop contracts requiring workers to give 'financial support' to unions legally authorized to act as their collective bargaining agents.* We sustained this requirement—and only this requirement—embodied in the statutory authorization of agreements under which 'all employees shall become members of the labor organization representing their craft or class.' *Clearly we passed neither upon forced association in any other aspect nor upon the issue of the use of exacted money for political causes which were opposed by the employees.*" (Footnote omitted, emphasis supplied.) 367 US 747-749.

Finding the *Street* record sufficiently concrete to present the issues not decided in *Hanson*, the Court went through an exhaustive analysis of the legislative histories of various Federal railroad labor acts, and then delivered the following construction of the Railway Labor Act's union shop provision:

"We give § 2, Eleventh the construction which achieves both congressional purposes when we hold, as we do, that § 2, Eleventh is to be construed to deny the unions, over an employee's objection, the power to use his exacted funds to support political causes which he opposes.

"We express no view as to other union expenditures objected to by an employee and not made to meet the costs of negotiation and administration of collective agreements, or the adjustment and settlement of grievances and disputes. We do not understand, in view of the findings of the Georgia courts and the question decided by the Georgia Supreme Court, that there is before us the matter of expenditures for activities in the area between the costs which led directly to the complaint as to 'free riders,' and the expenditures to support union political activities. We are satisfied, however, that § 2, Eleventh is to be interpreted to deny the unions the power claimed in this case. The appellant unions, in insisting that § 2, Eleventh contemplates their use of exacted funds to support political causes objected to by the employee, would have us hold that Congress sanctioned an expansion of historical practices in the political area by the rail unions. This we decline to do. Both by tradition and, from 1934 to 1951, by force of law, the rail unions did not rely upon the compulsion of union security agreements to exact money to support the political activities in which they engage. Our construction therefore involves no curtailment of the traditional political activities of the railroad unions. It means only that those unions must not support those activities, against the expressed wishes of a dissenting employee, with his exacted money." (Footnotes omitted.) 367 US 768-770.

The *Street* opinion emphasized that the objecting employees' cause of action arose under the Railway Labor Act, and not the First Amendment, because the exactions complained of were not authorized by that statute. 367 US 771.

The foregoing interpretations of *Hanson* and

Street clearly indicate that neither case was decided on First Amendment grounds, although the delimiting language of that provision arguably implicitly compelled the results reached.

In *Lathrop v Donohue*, 367 US 820; 81 S Ct 1826; 6 L Ed 2d 1191 (1961), a companion case to *Street*, Wisconsin attorney Lathrop brought an action in a state trial court to recover compulsorily exacted dues paid by him to the integrated Wisconsin State Bar, alleging the requirement to pay such dues to be unconstitutional under the First and Fourteenth Amendments[16] of the United States Constitution. The treasurer of the Wisconsin State Bar was named as the defendant.

The defendant demurred to the complaint on three grounds, one of which was that the complaint did not state facts sufficient to constitute a cause of action. The trial court sustained the demurrer on all three grounds, and then entered an order dismissing the complaint without leave to amend, for the reason that no amendment could cure the defects in the merits of the plaintiff's case. See 367 US 868-869 (Black, J., dissenting).

On appeal to the Wisconsin Supreme Court, the judgment of the trial court was affirmed. 10 Wis 2d 230; 102 NW2d 404 (1960). The Court held that the trial court was without subject matter jurisdiction to entertain the plaintiff's complaint, but went on to treat the complaint as if it had been originally filed in the reviewing court.

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[16] Section 1 of the Fourteenth Amendment of the United States Constitution provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

We read the Wisconsin Supreme Court's opinion as determining that the state had a sufficient interest in the achievement of the stated objectives of the integrated bar to justify the minimal compulsion of individuals effected by the requirement of association in, and payment of dues to, the integrated Wisconsin bar.

The United States Supreme Court, on appeal, divided sharply and entered a plurality judgment affirming the Wisconsin Supreme Court. That affirmance was later explained in *Abood v Detroit Board of Education*, 431 US 209, 233, fn 29; 97 S Ct 1782; 52 L Ed 2d 261 (1977), as follows:

> "In *Lathrop v Donohue*, 367 US 820, a companion case to *Street*, a Lawyer sued for the refund of dues paid (under protest) to the integrated Wisconsin State Bar. The dues were required as a condition of practicing law in Wisconsin. The plaintiff contended that the requirement violated his constitutionally protected freedom of association because the dues were used by the State Bar to formulate and to support legislative proposals concerning the legal profession to which the plaintiff objected.
>
> "A plurality of four Justices found that the requirement was not on its face unconstitutional, relying on the analogy to *Hanson*. And the plurality ruled, as had the Court in *Hanson*, that the constitutional questions tendered were not ripe, for the Court was nowhere 'clearly apprised as to the views of the appellant on any particular legislative issues on which the State Bar has taken a position, or as to the way in which and the degree to which funds compulsorily exacted from its members are used to support the organization's political activities.' 367 US at 845-846. The other five Members of the Court disagreed with the plurality and thought that the constitutional questions ought to be reached. Three Justices would have upheld the constitutionality of using compulsory dues to finance the State Bar's legislative activities even where opposed by dissenting members. See *id.*, at 848 (Harlan, J., concurring in

judgment); *id.*, at 865 (Whittaker, J., concurring in result). The other two Justices would have held such activities to be unconstitutional. See *ibid.* (Black, J., dissenting); *id.*, at 877 (Douglas, J., dissenting).

"The only proposition about which a majority of the Court in *Lathrop* agreed was that the constitutional issues should be reached. However, due to the disparate views of those five Justices on the merits and the failure of the other four Members of the Court to discuss the constitutional questions, *Lathrop* does not provide a clear holding to guide us in adjudicating the constitutional questions here presented."

It is clear from the foregoing that the United States Supreme Court did not resolve the merits of the constitutional issues raised by the plaintiff's arguments in *Lathrop*.

Although none of the three decisions discussed above was decided on First Amendment grounds, some analysis of them is necessary in order to fully understand the *Abood* decision, upon which Mr. Falk places considerable reliance.

B. Abood

In *Abood v Detroit Board of Education, supra,* the defendant board entered into a collective bargaining agreement with the Detroit Federation of Teachers, the certified exclusive representative of teachers employed by the board. The agreement implemented an agency shop[17] arrangement whereby all board-employed teachers were required to pay a service fee to the union as a condition of their employment, although they were not required to actually join the union.

Certain objecting teachers filed an action against the board, the union, and others, in circuit court

[17] See fn 12, *supra*.

alleging that the agency shop contract violated their First Amendment rights, in that the plaintiffs were opposed to collective bargaining in the public sector generally; and that the union was using the agency service fees to support ideological and political causes which were unrelated to collective bargaining activities and which were opposed by the plaintiffs.

The circuit court granted the defendants' motion for summary judgment,[18] finding the agency shop arrangement inoffensive to the plaintiffs' constitutional rights.

During the pendency of the plaintiffs' subsequent appeal from the summary judgment, this Court decided *Smigel v Southgate Community School Dist*, 388 Mich 531; 202 NW2d 305 (1972), which held that the Michigan public employment relations act (PERA), as then written, did not authorize or permit agency shop contracts in the public employment sphere.

The *Abood* application for leave to appeal then reached this Court. On the authority of *Smigel* the circuit court's summary judgment was vacated and the case was remanded to that court "for further proceedings consonant herewith", *sub nom Warczak v Detroit Board of Education*, 389 Mich 755 (1972).

The Legislature then amended PERA to expressly authorize agency shop contracts in the public sector. 1973 PA 25; MCL 423.210(1); MSA 17.455(10)(1).

On remand to the circuit court, the defendants filed a new motion for summary judgment based on the premise that the PERA amendment autho-

[18] The motion was brought pursuant to GCR 1963, 117.2(1), on the ground that the opposing party had failed to state a claim upon which relief could be granted.

rizing agency shops should be given retroactive effect (thereby effectively reversing *Smigel*). The circuit court granted the new summary judgment motion.

On appeal to the Michigan Court of Appeals, the trial court was reversed. *Abood v Detroit Board of Education*, 60 Mich App 92; 230 NW2d 322 (1975). The Court of Appeals held that the legislative amendment to PERA concerning agency shop agreements was prospective only. This holding would have been dispositive of the *Abood* case, since *Abood* involved a pre-PERA amendment agency shop agreement.[19]

However, the Court of Appeals went on to frame the following issue at 60 Mich App 98:

"Does the agency shop clause violate plaintiffs' First and Fourteenth Amendment rights securing freedom of speech and freedom of association?"

The Court of Appeals then discussed the United States Supreme Court's decisions in *Hanson* and *Street* and concluded:

"We have before us then, two powerful countervailing public policies. We are asked, on the one hand, to preserve freedom of expression, and, on the other, to promote labor stability. But freedom of expression is a constitutional right so basic to our form of government that it must be jealously guarded. This is particularly true where, as here, employees are compelled by the government to support the collective bargaining activities of an organization which they prefer not to join. Justice Douglas expressed this concern well in his concurring opinion in *Street*:

" 'If an association is compelled, the individual should

[19] See the United States Supreme Court's analysis on this point in *Abood v Detroit Board of Education*, 431 US 209, 216, fn 9; 97 S Ct 1782; 52 L Ed 2d 261 (1977).

not be forced to surrender any matters of conscience, belief, or expression. He should be allowed to enter the group with his own flag flying, whether it be religious, political, or philosophical; nothing that the group does should deprive him of the privilege of preserving and expressing his agreement, disagreement, or dissent, whether it coincides with the view of the group, or conflicts with it in minor or major ways; and he should not be required to finance the promotion of causes with which he disagrees.' 367 US at 776 * * *.

"Therefore, we conclude that the agency shop clause, as prospectively authorized by the amendment to MCL 423.210; MSA 17.455(10), could violate plaintiffs' First and Fourteenth Amendment rights." 60 Mich App 100.

The record presented was, however, found to be inadequate to merit relief:

"To reiterate briefly, employees who are forced to contribute service fees to a collective bargaining representative may not be deprived of First Amendment freedom of expression. But, in order to preserve this right, the employee must make known to the union those causes and candidates to which he objects. The remedy then would be restitution to the employee of that portion of his money expended by the union over his objection." 60 Mich App 102.

This Court subsequently denied leave to appeal from the Court of Appeals decision. 395 Mich 755-756 (1975).

On appeal to the United States Supreme Court, the judgment of the Michigan Court of Appeals was vacated and the case was remanded to the trial court for further proceedings.

The majority opinion framed the following issue:

"The issue before us is whether [the agency shop] arrangement violates the constitutional rights of government employees who object to public-sector unions

as such or to various union activities financed by the compulsory service fees." *Abood v Detroit Board of Education*, 431 US 209, 211.

The majority observed that "[t]o compel employees financially to support their collective-bargaining representative has an impact on their First Amendment interests", 431 US 222, and then considered the applicability of *Hanson* and *Street* to the *Abood* facts:

"The distinctive nature of public-sector bargaining has led to widespread discussion about the extent to which the law governing labor relations in the private sector provides an appropriate model. To take but one example, there has been considerable debate about the desirability of prohibiting public employee unions from striking, a step that the State of Michigan itself has taken, [MCL 423.202]. But although Michigan has not adopted the federal model of labor relations in every respect, it has determined that labor stability will be served by a system of exclusive representation and the permissive use of an agency shop in public employment. As already stated, there can be no principled basis for according that decision less weight in the constitutional balance than was given in *Hanson* to the congressional judgment reflected in the Railway Labor Act. The only remaining constitutional inquiry evoked by the appellants' argument, therefore, is whether a public employee has a weightier First Amendment interest than a private employee in not being compelled to contribute to the costs of exclusive union representation. We think he does not." (Footnotes omitted.) 431 US 229.

Shortly thereafter the Court said:

"The differences between public- and private-sector collective bargaining simply do not translate into differences in First Amendment rights. Even those commentators most acutely aware of the distinctive nature of public-sector bargaining and most seriously concerned

with its policy implications agree that '[t]he union security issue in the public sector * * * is fundamentally the same issue * * * as in the private sector * * *. No special dimension results from the fact that a union represents public rather than private employees.' Wellington & Winter, The Unions and the Cities (1971), pp 95-96. We conclude that the Michigan Court of Appeals was correct in viewing this Court's decisions in *Hanson* and *Street* as controlling in the present case insofar as the service charges are applied to collective-bargaining, contract administration, and grievance-adjustment purposes." 431 US 232.

After the Court determined that the *Abood* record did not permit avoidance of the First Amendment issues raised, the following analysis and conclusion were stated:

"Our decisions establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments. *E.g., Elrod v Burns,* 427 US 347, 355-357 [96 S Ct 2673; 49 L Ed 2d 547 (1976)] (plurality opinion); *Cousins v Wigoda,* 419 US 477, 487 [95 S Ct 541; 42 L Ed 2d 595 (1975)]; *Kusper v Pontikes,* 414 US 51, 56-57 [94 S Ct 303; 38 L Ed 2d 260 (1973)]; *NAACP v Alabama ex rel Patterson,* 357 US 449, 460-461 [78 S Ct 1163; 2 L Ed 2d 1488 (1958)]. Equally clear is the proposition that a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment. *E.g., Elrod v Burns, supra,* at 357-360, and cases cited; *Perry v Sindermann,* 408 US 593 [92 S Ct 2694; 33 L Ed 2d 570 (1972)]; *Keyishian v Board of Regents,* 385 US 589 [87 S Ct 675; 17 L Ed 2d 629 (1967)]. The appellants argue that they fall within the protection of these cases because they have been prohibited, not from actively associating, but rather from refusing to associate. They specifically argue that they may constitutionally prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unre-

lated to its duties as exclusive bargaining representative. We have concluded that this argument is a meritorious one.

"One of the principles underlying the Court's decision in *Buckley v Valeo*, 424 US 1 [96 S Ct 612; 46 L Ed 2d 659 (1976)], was that contributing to an organization for the purpose of spreading a political message is protected by the First Amendment. Because '[m]aking a contribution * * * enables like-minded persons to pool their resources in furtherance of common political goals,' *id.*, at 22, the Court reasoned that limitations upon the freedom to contribute 'implicate fundamental First Amendment interests,' *id.*, at 23.

"The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State. See *Elrod v Burns, supra*, at 356-357; *Stanley v Georgia*, 394 US 557, 565 [89 S Ct 1243; 22 L Ed 2d 541 (1969)]; *Cantwell v Connecticut*, 310 US 296, 303-304 [60 S Ct 900; 84 L Ed 1213; 128 ALR 1352 (1940)]. And the freedom of belief is no incidental or secondary aspect of the First Amendment's protections:

" 'If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.' *West Virginia Bd of Ed v Barnette*, 319 US 624, 642 [63 S Ct 1178; 87 L Ed 1628; 147 ALR 674 (1943)].

"These principles prohibit a State from compelling any individual to affirm his belief in God, *Torcaso v Watkins*, 367 US 488 [81 S Ct 1680; 6 L Ed 2d 982 (1961)], or to associate with a political party, *Elrod v Burns, supra;* see 427 US, 363-364, fn 17, as a condition of retaining public employment. They are no less applicable to the case at bar, and they thus prohibit the appellees from requiring any of the appellants to contribute to the support of an ideological cause he may

oppose as a condition of holding a job as a public school teacher." (Footnotes omitted.) 431 US 233-235.

With reference to the issue framed by the United States Supreme Court, p 101, *supra*, *we* read *Abood* as holding: (1) that, as in *Hanson*, the State of Michigan's authorization of agency shop agreements in the public sector served a sufficiently compelling state interest in the achievement of labor stability to permit impingement on public employees' First Amendment rights to the extent of requiring payment of service fees for purposes germane to the collective bargaining duties of the teachers' union; and (2), that to the extent that agency fees were exacted and used for purposes beyond or apart from those activities related to collective bargaining, the plaintiffs had stated a claim upon which relief could be granted under the First Amendment.[20]

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[20] The Court drew no lines between the permissible and the impermissible, 431 US 236, and further clarified the context in which its decision was made:

"All that we decide is that the general allegations in the complaints, if proved, establish a cause of action under the First and Fourteenth Amendments." 431 US 237.

This language suggests that as to the compulsion of service fees for activities relating to collective bargaining, the complaints in *Abood* failed to state a claim upon which relief could be granted under the First and Fourteenth Amendments. As to the compulsion of service fees for other purposes, the plaintiffs' complaint did state a claim, and further proceedings going to the proof of that claim were required before a delineation of what activities were constitutionally permissible could be made. Established First Amendment principles indicate that, once an individual has stated a valid claim under the First Amendment, the burden of proof shifts to the state to show the infringement on individual rights that is claimed is unavoidable in order to accomplish a compelling state interest. See, *e.g.*, *Elrod v Burns*, 427 US 347, 363; 96 S Ct 2673; 49 L Ed 2d 547 (1976) (Brennan, J., plurality opinion).

As previously stated, in the present case, this Court sits, under these unusual circumstances, as the trial court. Indeed, our order apointing a fact-finder for the purpose of conducting a hearing on the factual matters here involved necessarily implicitly recognized that Mr. Falk's pleading stated a claim in First Amendment terms which

With the foregoing understanding of *Abood* and its progenitors in mind, we now proceed to our analysis of the present case.

III. ANALYSIS

A. Controlling Principles

While the decision in *Abood* is of primary significance to the instant case, it does not offer a clear statement of the controlling framework for analysis of First Amendment issues of the kind here presented. We therefore turn to the earlier United States Supreme Court decision in *Elrod v Burns*, 427 US 347; 96 S Ct 2673; 49 L Ed 2d 547 (1976), which does.

In *Elrod*, non-civil service employees of the Cook County, Illinois, Sheriff's Department challenged the constitutionality of the longstanding patronage system in that county. Under that system, employees were required to become affiliated with or sponsored by the political party in control of the office of Sheriff, or face the likelihood of being discharged.

Justice Brennan's lead opinion in the plurality decision neatly summarized the controlling First Amendment principles:

"Although the practice of patronage dismissals clearly infringes First Amendment interests, our inquiry is not at an end, for the prohibition on encroachment of First Amendment protections is not an absolute. Restraints are permitted for appropriate reasons. *Keyishian* and *Perry*, however, not only serve to establish a presumptive prohibition on infringement, but also serve to dispose of one suggested by petitioners' reference to this Court's affirmance by an equally di-

required development of an appropriate factual record. See 402 Mich 960 (1978).

vided court in *Bailey v Richardson*, 341 US 918 [71 S Ct 669; 95 L Ed 1352] (1951), *aff'g* 86 US App DC 248; 182 F2d 46 (1950). That is the notion that because there is no right to a government benefit, such as public employment, the benefit may be denied for any reason. *Perry*, however, emphasized that '[f]or at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely.' 408 US, at 597. *Perry* and *Keyishian* properly recognize one such impermissible reason: The denial of a public benefit may not be used by the government for the purpose of creating an incentive enabling it to achieve what it may not command directly. ' "[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." ' *Keyishian v Board of Regents*, 385 US, at 605-606. 'It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.' *Sherbert v Verner*, 374 US 398, 404 [83 S Ct 1790; 10 L Ed 2d 965] (1963). ' "[T]his Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege'." ' *Sugarman v Dougall*, 413 US 634, 644 [93 S Ct 2842; 37 L Ed 2d 853 (1973)] (quoting *Graham v Richardson*, 403 US 365, 374 [91 S Ct 1848; 29 L Ed 2d 534 (1971)]).

"While the right-privilege distinction furnishes no ground on which to justify patronage, petitioners raise several other justifications requiring consideration. Before examining those justifications, however, it is necessary to have in mind the standards according to which their sufficiency is to be measured. It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny. *Buckley v Valeo*, 424 US, at 64-65; *NAACP v Alabama [ex rel Patterson]*, 357 US [449, 460-461; 78 S Ct 1163; 2 L Ed 2d 1488 (1958)]. 'This type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government ac-

tion, but indirectly as an unintended but inevitable result of the government's conduct. * * *' *Buckley v Valeo, supra,* at 65. Thus encroachment 'cannot be justified upon a mere showing of a legitimate state interest.' *Kusper v Pontikes,* 414 US, at 58. The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest. *Buckley v Valeo, supra,* at 94; *Williams v Rhodes,* 393 US [23, 31-33; 89 S Ct 5; 21 L Ed 2d 24 (1968)]; *NAACP v Button,* 371 US 415, 438, 444 [83 S Ct 328; 9 L Ed 2d 405 (1963)]; *Bates v Little Rock,* 361 US 516, 524 [80 S Ct 412; 4 L Ed 2d 480 (1960)]; *NAACP v Alabama [ex rel Patterson], supra,* 464-466; *Thomas v Collins,* 323 US 516, 530 [65 S Ct 315; 89 L Ed 430 (1945)]. In the instant case, care must be taken not to confuse the interest of partisan organizations with governmental interests. Only the latter will suffice. Moreover, it is not enough that the means chosen in furtherance of the interest be rationally related to that end. *Sherbert v Verner, supra,* [374 US] at 406. The gain to the subordinating interest provided by the means must outweigh the incurred loss of protected rights, see *United Public Workers v Mitchell,* 330 US [75, 96; 67 S Ct 556; 91 L Ed 754 (1947)], and the government must 'employ] means closely drawn to avoid unnecessary abridgment. * * *' *Buckley v Valeo, supra,* at 25. '[A] State may not choose means that unnecessarily restrict constitutionally protected liberty. "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties.' *Kusper v Pontikes, supra,* at 59 (citations omitted). See *United States v Robel,* 389 US 258 [88 S Ct 419; 19 L Ed 2d 508 (1967)]; *Shelton v Tucker,* 364 US 479 [81 S Ct 247; 5 L Ed 2d 231 (1960)]. In short, if conditioning the retention of public employment on the employee's support of the in-party is to survive constitutional challenge, it must further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss

of constitutionally protected rights." (Footnotes omitted.) *Elrod v Burns*, 427 US 360-363. See, also, *Abood v Detroit Board of Education*, 431 US 259-261 (Powell, J., concurring in judgment).

As the above quoted passage states, First Amendment protections are not absolute. The compelling interests of government may justify restrictions on the First Amendment freedoms of individuals.

It remains to be determined how, if at all, the arguments of the parties before us are to be resolved by application of the above-stated constitutional principles.

B. Arguments

The essence of Mr. Falk's First Amendment argument is that *Abood* mandates a ruling in this case that he cannot be compelled to pay dues which are used for non-regulatory activities of the State Bar, particularly lobbying and other political activities.

The State Bar responds that *Abood* is foremost a labor law case, and is not applicable in the present action. The State Bar is not a labor organization, but is rather a "public body corporate" that operates as a public or state agency. Further, the State Bar argues that the grant of permission to practice law is a privilege and not a right. The state may burden this privilege with conditions. Finally, the State Bar contends that assuming *arguendo* the applicability of *Abood* here, all that case requires is that dues be "imposed for purposes germane to the organization and existence of the State Bar", which includes those purposes stated in State Bar Rule 1.

As shall be hereinafter developed, we find the

plaintiff's arguments and authorities to be the more convincing.

C. Holding

Certainly *Abood* and the case before us can be distinguished. However, neutral analysis reveals that the factual differences in the two cases lead to the conclusion that the First Amendment principles announced and applied to the facts in *Abood* impact with even greater force upon the present case.

In *Abood*, the United States Supreme Court found certain attributes of an agency shop agreement, permissively authorized by state law, potentially violative of the objecting teachers' First Amendment rights. While all teachers must be state-certified in Michigan,[n] they are not required to join any state-controlled organization. Indeed, the teachers in *Abood* could have avoided the violation of their First Amendment rights by seeking employment with an unorganized Michigan school district, or with unorganized private or parochial Michigan schools. While the state had authorized school districts and teacher organizations to voluntarily enter agency shop contracts, the state has never required individual teachers to associate with and pay dues to a teacher's association as a condition of obtaining and maintaining certification as a teacher in Michigan.

On the other hand, we are here concerned with the propriety of state-compelled association in, and financial support of, a "public body corporate" as a condition precedent to the pursuit of one's liveli-

[n] See MCL 380.1531 *et seq.*; MSA 15.41531 *et seq.*; MCL 388.551, 388.553; MSA 15.1921, 15.1923.

hood as an attorney in this state, in any active legal capacity. No alternatives, even unpalatable ones, exist for the objecting individual attorney.

Mr. Falk's petition does not specify which of his First Amendment rights are offended. However, we are satisfied that his pleading raises issues involving his rights to freedom of association[23] and freedom of belief.[24] The State of Michigan's requirement of association with, and financial support of, the integrated State Bar clearly has a significant impact on these rights. See *Abood v Detroit Board of Education*, 431 US 222.

First Amendment guarantees are made applicable to the several states through the Due Process Clause of the Fourteenth Amendment. See *Gitlow v New York*, 268 US 652, 666; 45 S Ct 625; 69 L Ed 1138 (1925); *De Jonge v Oregon*, 299 US 353, 364-365; 57 S Ct 255; 81 L Ed 278 (1937). It is well established that state action which infringes on First Amendment rights can only be tolerated where such infringement is unavoidably required in order to further a "compelling",[25] "para-

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[23] See *Abood v Detroit Board of Education*, fn 2 *supra*, 431 US 233; *Cousins v Wigoda*, 419 US 477, 487; 95 S Ct 541; 42 L Ed 2d 595 (1975); *Kusper v Pontikes*, 414 US 51, 56-57; 94 S Ct 303; 38 L Ed 2d 260 (1973).

[24] See *Abood v Detroit Board of Education*, fn 2 *supra*, 431 US 234-235; *Stanley v Georgia*, 394 US 557, 565; 89 S Ct 1243; 22 L Ed 2d 542 (1969); *Cantwell v Connecticut*, 310 US 296, 303-304; 60 S Ct 900; 84 L Ed 1213; 128 ALR 1352 (1940); *Wooley v Maynard*, 430 US 705, 714-715; 97 S Ct 1428; 51 L Ed 2d 752 (1977). See also *Elrod v Burns*, 427 US 347, 355-356; 96 S Ct 2673; 49 L Ed 2d 547 (1976) (Brennan, J., plurality opinion).

[25] See *Bates v Little Rock*, 361 US 516, 524; 80 S Ct 412; 4 L Ed 2d 480 (1960); *NAACP v Button*, 371 US 415, 438-439; 83 S Ct 328; 9 L Ed 2d 405 (1963); *Williams v Rhodes*, 393 US 23, 30-32; 89 S Ct 5; 21 L Ed 2d 24 (1968); *Storer v Brown*, 415 US 724, 729; 94 S Ct 1274; 39 L Ed 2d 714 (1974); *American Party of Texas v White*, 415 US 767, 780; 94 S Ct 1296; 39 L Ed 2d 744 (1974); *Wooley v Maynard*, 430 US 705, 715-716; 97 S Ct 1428; 51 L Ed 2d 752 (1977). See also *Ohralik v Ohio State Bar Ass'n*, 436 US 447, 462; 98 S Ct 1912; 56 L Ed 2d 444 (1978).

mount",[25] or "vital"[26] state interest. Unquestionably, the state has very strong, even compelling, interests in the regulation of, and maintenance of high standards in, the legal profession, "since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts' ". See *Ohralik v Ohio State Bar Ass'n*, 436 US 447, 460; 98 S Ct 1912; 56 L Ed 2d 417 (1978) (citation omitted). Nonetheless, and although the permission to practice law may rightly be regarded as a privilege, the state's intrusion on First Amendment rights of all individuals, including attorneys, must be consciously and scrupulously minimized.

We therefore conclude that, in light of the controlling First Amendment principles as hereinabove discussed, the State of Michigan, through the combined actions of this Court, the Legislature, and the State Bar, may compulsorily exact dues, and require association, to support only those duties and functions of the State Bar which serve compelling state interests and which cannot be accomplished by means less intrusive upon the First Amendment rights of objecting individual attorneys. See *Abood v Detroit Board of Education, supra; Elrod v Burns, supra*, at 360-363 (Brennan, J., plurality opinion); see also cases cited in fns 24, 25 and 26.

IV. FINDINGS, CONCLUSIONS, AND RELIEF

Having considered the pleadings, the briefs, the oral arguments of the parties, the report of the

[25] See *Elrod v Burns*, 427 US 347, 362; 96 S Ct 2673; 49 L Ed 2d 547 (1976) (Brennan, J., plurality opinion).

[26] *American Party of Texas v White*, fn 24 *supra*, 415 US 780-781. See also *Elrod v Burns*, fn 25 *supra*, 427 US 360-363; *Buckley v Valeo*, 424 US 1, 93-94; 96 S Ct 612; 46 L Ed 2d 659 (1976).

fact-finder, and other relevant material and authorities, we make the following findings of fact and conclusions of law:[27]

1. That the original pleading in this action, entitled "Petition for Special Relief", is in the nature of a complaint for a writ of superintending control, and is within this Court's original jurisdiction pursuant to GCR 1963, 851(6); MCL 600.215, 600.219; MSA 27A.215, 27A.219

2. That plaintiff Allan Falk is, and has been, like all active attorneys in this state, required as a matter of law to be a member of the State Bar of Michigan and is, and has been, required to pay dues in support of that organization;

3. That Mr. Falk has been excused of the obligation to pay any dues to the State Bar of Michigan during the pendency of this action;

4. That the State Bar of Michigan engages in many activities which the plaintiff's dues have been, and would now be, used to support, and with which the plaintiff must associate by virtue of his compulsory membership in the State Bar;

5. That Mr. Falk's Petition for Special Relief and his briefs in support thereof express his objec-

[27] As previously indicated, fn 4 *supra*, no other member of the State Bar has sought to intervene in this case, although pendency of this action was reported in the Michigan State Bar Journal. See 57 Mich State Bar J 224-225 (March, 1978).

We realize that, to the extent that this decision has retroactive application, restitution of improperly used bar dues would be the appropriate equitable remedy. However, we are equally aware of the pertinence here of the maxim of equity that "equity aids the vigilant, not those who sleep on their rights". See *Zoellner v Zoellner*, 46 Mich 511, 515; 9 NW 831 (1881); *Douglass v Douglass*, 72 Mich 86, 98-99; 40 NW 177 (1888); *Henderson v Connolly's Estate*, 294 Mich 1, 18-20; 292 NW 543 (1940); *Gustin v Alpena Power Co*, 307 Mich 241, 244; 11 NW2d 873 (1943). We find this principle particularly forceful in the present circumstances, since the group of persons affected by this decision is composed of trained and qualified lawyers, presumably well-informed on such matters, and certainly on notice as to the pendency of this action.

tions, on First Amendment grounds and otherwise, to various activities of the State Bar of Michigan, and that such petition states a claim upon which relief can be granted under the First Amendment;

6. That the controlling United States Supreme Court decisions relevant to Mr. Falk's claim mandate that the State of Michigan, through its various branches of government and its agencies, cannot require association with, or payment of dues in support of, the State Bar of Michigan for other than those duties and functions of the State Bar which serve compelling state interests and which cannot be achieved by means less intrusive upon the First Amendment rights of objecting attorneys;

7. That under the controlling United States constitutional principles, once an individual has stated a claim upon which relief can be granted under the First Amendment, the burden is on the state or its agency to show the existence of a compelling interest which cannot be achieved with less intrusion upon the affected individual's First Amendment rights;

8. That the regulation of the practice of law, the maintenance of high standards in the legal profession, and the discharge of the profession's duty to protect and inform the public are, in the context of the present challenge, purposes in which the State of Michigan has a compelling interest which will justify unavoidable intrusions on the First Amendment rights of objecting attorneys;

9. That the record in this case establishes that the defendant State Bar of Michigan has shown a compelling state interest in the following functions of the State Bar, and that such functions cannot be accomplished by means less intrusive on the First Amendment rights of an objecting attorney:

A. All regulatory activities, including attorney

disciplinary proceedings as provided in GCR 1963, 950 *et seq.*, to the extent that such activities are funded out of compulsorily exacted State Bar dues; all licensing-related activities such as those provided for in State Bar Rule 15;

B. All continuing legal education activities presently engaged in by the State Bar which are directed to the maintenance of high professional standards among Michigan attorneys;

C. The publication of the Michigan Bar Journal insofar as that publication is primarily devoted to informing the members of the State Bar on current matters relating to regulation of the profession and the improvement of professional standards;

D. The Client Security Fund insofar as it represents a discharge of a duty to protect the public from recreant members of the profession. The cost of this fund is properly distributed among all members of the profession regardless of individual predilections toward or opportunity for wrongdoing. Support of the Client Security Fund is but a logical and necessary extension of our admittedly imperfect regulatory and licensing standards and is a duty necessarily imposed on a profession committed to the public interest;

E. Those activities designed to educate the general public concerning the use of legal services and the relationship between individuals and the legal system generally. This should not be read to include those outreach programs designed to educate the public concerning specific legislation or promoting specific viewpoints. Permissible activities in this area include the publication and distribution of such booklets as "You and the Law", and the "Juror's Manual";

F. Activities designed to make legal services

more accessible, including the Lawyer Referral Service and support for those legal aid organizations serving the indigent. These activities represent a part of the service every attorney owes the public and hence compelling support for them cannot be deemed constitutionally obnoxious.

10. That the political and legislative activities of the bar, which constitute a function wholly separable from its other activities, violate petitioner Falk's First Amendment rights of association and expression.

The record clearly discloses the extent of the State Bar's legislative and lobbying activities. These include but are not limited to: rendering technical advice to the Legislature; testifying before the State Officers Compensation Commission; adopting and publishing official positions on proposed legislation; and retaining a professional lobbyist. To the extent these efforts are funded by mandatory dues, the State Bar impermissibly infringes on the First Amendment freedoms of its individual members.

The ultimate objective of these political and legislative activities is to influence public decision-making. Even if specific legislative-political goals can be justified as advancing the public interest or improving the administration of justice, compelled support and association to further these activities is not constitutionally acceptable. The "public interest" and the "advancement of jurisprudence" are not unitary concepts subject to a single interpretation. Disagreements regarding legislative or other policy choices arise not only because they result in differing practical effects on individuals, but more importantly because they reflect differing ideological approaches to the subject matter. Such ideological beliefs, and association to promote or

oppose such beliefs, lie at "the core of those activities protected by the First Amendment". *Elrod v Burns*, *supra*, 356.

That Petitioner Falk is entitled to express his disagreement within the organizational framework does not wholly diminish the fact that he is being forced to associate for purposes contrary to his beliefs. The focus is not upon freedom of expression within the organization, but rather upon whether the state can justify the forced association in the first instance.

We do not believe that for First Amendment purposes a distinction can be drawn between legislation aimed at issues loosely termed procedural, such as court reorganization and rules of evidence in product liability actions and the like, and those termed substantive. In either category of legislation, the choice of one approach over another is necessarily premise-based and thus subject to contrary opinion or belief. Compelling a dissenter to finance the encouragement of such First Amendment related legislation and associate with its advancement, whether or not he or she opposes it, cannot be justified in the absence of an overriding state need and then only by means narrowly drawn.

In light of alternative methods available to the Legislature to obtain expert legal advice as to both "substantive" and "procedural" legislation, we see no compelling interest to justify the State Bar's legislative activities supported by compulsory dues. Specifically, the Legislature possesses subpoena power, MCL 4.101; MSA 2.181, and has access to the Legislative Service Bureau, the Attorney General, and House and Senate counsel, as well as committee counsel. Additionally, there are a number of voluntary and self-supporting sections

within the State Bar from whom the Legislature can seek input on legal questions. Further, while they cannot be compelled to do so, individual members may be given the opportunity and may choose to voluntarily support legislative and lobbying activities undertaken by the State Bar.

11. That similarly the broad category of State Bar activities designed to further the commercial and economic interests of the members cannot survive First Amendment scrutiny. Unlike the union members in *Abood*, attorneys cannot be categorized as a group with homogeneous economic interests. In fact, the economic interests of different attorneys often are in direct conflict. Such conflicts, and the requirement that members contribute to an association which may, therefore, undercut their self-interests, cannot be brushed aside as something that will be ameliorated by the "democratic process" within the bar. Further, and more important, furtherance of the commercial interests of attorneys, just as those of doctors or accountants, can hardly be found to constitute a compelling governmental interest. Since the end itself cannot be justified, the means designed to serve that end, such as the Lawyer Placement Service, must fall in the face of a First Amendment challenge.

12. That as to all other State Bar of Michigan activities, the present record fails to demonstrate a compelling state interest which cannot be served by means less intrusive on the First Amendment rights of an objecting individual attorney.

However, apart from those permissible activities discussed in paragraph 9, the State Bar's legislative and lobbying activities, and those activities solely designed to further the commercial interests of its membership, we acknowledge that determi-

nation of the state interest in the remainder of the challenged State Bar activities and whether that interest, if compelling, is served by narrowly drawn means is made difficult, indeed impossible, by a most inadequate record.

Consequently, we would order:

A. That the State Bar of Michigan be enjoined from disbursing compulsorily exacted dues for any functions or purposes other than those described in paragraphs 9A-9F effective as of October 1, 1981, the end of the State Bar of Michigan's fiscal year and that, in the interim, the bar poll its members to identify those willing to support such other activities on a voluntary basis and permit solicitation of contributions from those members for these purposes.

The bar would be permitted, in the interim, to present further facts to this Court, through a master, only as to those activities for which we have concluded the record is inadequate for the purpose of demonstrating an as yet unrevealed compelling interest unavoidably served by mandatory dues.

B. That the State Bar of Michigan determine the proportion of dues paid by each member which does not relate to the above-declared constitutional purposes and functions, and that the amount of dues as of and after October 1, 1981 be reduced accordingly.

C. That plaintiff Allan Falk be advised of the portion of his excused bar dues which relates to the purposes of the State Bar described in paragraphs 9A-9F, and that he pay to the State Bar that amount within 30 days after he is so notified.

FITZGERALD and BLAIR MOODY, JR., JJ., concurred with RYAN, J.

WILLIAMS, J. The principal issue in this case is whether an "integrated" state bar with mandatory membership of all attorneys in the state can perform specified activities, financed in part by compulsory dues, without violating First Amendment rights of those dues paying member attorneys not in accord with such activities. The complained-of activities specified are the following: (1) lobbying and other political activity, (2) compulsory membership in Young Lawyers Section, (3) promoting prepaid legal services, (4) lawyer referral, (5) lawyer placement, (6) Client Security Fund, (7) public education about legal services, (8) funding of Lawyers Wives of Michigan and Children's Charter of Michigan activities, (9) giving and paying for social functions, including those where the Supreme Court Justices are guests of honor, (10) appearing before the State Officers Compensation Commission in support of higher Supreme Court and other judicial salaries, and (11) sale of use of State Bar mailing roster.

After careful consideration of the authority delegated to the Michigan State Bar and the compelling state interest on the one hand, and the possible infringement of petitioner's First Amendment rights in the 11 specific instances on the other hand, this Court holds that there is no showing of an unconstitutional violation of petitioner's First Amendment rights with respect to the above items, excepting item 11 where we find an invasion of petitioner's right to privacy. We note there was no record reference to political activities, such as support of, or opposition to, partisan candidates and partisan issues, which would be offensive to both the State Bar Rules and the First Amendment.

I. FACTS

Petitioner is required by state law[1] and by court rule[2] to belong to and pay dues to the Michigan State Bar. It is petitioner's basic contention, culled from both his broad "Petition for Special Relief" and his tripartite pleadings (brief, reply brief and supplemental reply brief), that the use of his compulsory dues monies for the aforementioned State Bar sponsored activities occasions an unconstitutional infringement of his First Amendment rights

[1] 1935 PA 58. This act, in pertinent part, provided:

"AN ACT to create the state bar of Michigan; and to authorize the supreme court to provide for the organization, regulation and rules of government thereof.

"The People of the State of Michigan enact:

"Sec. 1. There is hereby created an association to be known as the state bar of Michigan, the membership of which shall consist of all persons in the state now or hereafter regularly licensed to practice law in this state.

"Sec. 2. The supreme court is hereby authorized to provide for the organization and regulation of the state bar of Michigan; to provide rules and regulations concerning the conduct and activities of the association and its members; the schedule of membership dues therein, * * * non-payment of which shall be ground for suspension, the ethical standards to be observed in the practice of law, and the discipline, suspension or disbarment of association members. * * *"

[2] Supreme Court Rules concerning the State Bar of Michigan provide in pertinent part:

"RULE 2. MEMBERSHIP.

"Those persons who are licensed to practice law in this State on December 2, 1935, and those who shall become licensed thereafter to practice law in this State, shall constitute the membership of the State Bar of Michigan subject to the provisions of these rules."

"RULE 4. MEMBERSHIP DUES.

"(a) An active member's dues for each fiscal year (October 1 through September 30), payable at the State Bar's principal office by October 1 of each year, are:

"(1) $150, for a member admitted to practice 3 years or more (counting the fiscal year in which admission took place as a full year), admitted from another jurisdiction, or admitted under Board of Law Examiners Rule 5(D);

"(2) $90, for a member admitted to practice less than 3 years. For the fiscal year of admission, dues are $90 if admitted between October 1 and March 31, and $45 if admitted between April 1 and September 30."

because those activities are not in furtherance of the "regulation" of the bar.[3] Petitioner would therefore have us rule[4] that the only State Bar activities which constitutionally "regulate" the profession and thus sanction the use of his dues monies therefor, are those which relate to "regulation and discipline of the profession, continuing legal education, and related licensing functions", as well as "associated administrative and other overhead expenses".

II. GENERAL BACKGROUND

Petitioner's complaint is based essentially on the following line of reasoning:

(1) Authority over the integrated state bar derives from 1935 PA 58;

(2) Authority over the integrated state bar is

[3] In addition to his Federal First Amendment arguments (freedom of association, freedom of speech, freedom of religion, and right to privacy), petitioner's brief also discusses possible violations of the Federal Commerce Clause, US Const, art I, § 8, cl 3, and Const 1963, art 4, § 24 (title-body clause); art 4, § 30 (assent of two-thirds of each house of the Legislature required for appropriating public money for private purposes); and art 3, § 2 (separation of powers principle).

[4] This case was commenced as an original proceeding in this Court on November 30, 1977 when the petitioner filed his "Petition for Special Relief", naming the State Bar of Michigan as defendant. Acting on this petition, this Court subsequently appointed former Judge Maurice E. Schoenberger to conduct hearings and make findings of fact on the issues petitioner raised. 402 Mich 960 (1978). These hearings were held on June 5 and 6, 1978. Both parties presented testimony and exhibits relating to the various activities and functions of the State Bar, and Judge Schoenberger concluded that there were no controverted factual matters which required resolution.

We agree with Justice RYAN'S treatment of this petition as a complaint for writ of superintending control over the State Bar, within our original jurisdiction, GCR 1963, 851(6); MCL 600.215, 600.219; MSA 27A.215, 27A.219, and with his interpretation of the petition for special relief as a request that we relieve petitioner of the obligation of paying the pro rata portion of his State Bar dues which relates to the complained-of activities, except insofar as petitioner requests in his brief that the State Bar be required to remove his name from its "commercial solicitation mailing list".

confined to "regulation" of the legal profession; "regulation" is limited to the "regulation and discipline of the profession, continuing legal education, and related licensing functions", as well as "associated administrative and other overhead expenses", which do not include the 11 specified activities to which petitioner objects;

(3) Petitioner's First Amendment rights are infringed when the integrated state bar pursues activities other than "regulation" because the petitioner's dues payments may then help finance activities to which petitioner may be ideologically opposed or from which petitioner derives no direct pecuniary benefit;

(4) *Abood v Detroit Board of Education*, 431 US 209; 97 S Ct 1782; 52 L Ed 2d 261 (1977), supports petitioner's position.

As a consequence, this Court's inquiry necessarily must consider the following questions among others:

(1) Is the Supreme Court's authority over the integrated state bar derived exclusively from 1935 PA 58, or is it also derived from this Court's inherent power in the administration of justice?

(2) Is authority over the integrated state bar confined to "regulation" of the legal profession in the sense petitioner uses regulation or is the Supreme Court's power broader so as to cover some or all of the 11 specified activities pursued by the State Bar?

(3) What is the legal interplay between petitioner's asserted First Amendment rights and the state's compelling interest in this matter?

(4) What guidance is there for the present matter, where the state's compelling interest is in the improvement of the administration of justice and advancement in jurisprudence, from *Abood* where

the state's compelling interest was in labor peace through collective bargaining?

III. INHERENT POWER OF THE SUPREME COURT AND STATE BAR RULE 1

The keystone of petitioner's argument is his interpretation of the word "regulation" found in 1935 PA 58, the act which, in its own words, "created" the integrated State Bar in Michigan. According to petitioner, it is this "procreative engendering legislation" from which this Court derives its power to impose dues, and which limits the State Bar to "regulatory" purposes in expending dues monies.

In view of petitioner's assertions concerning both what he perceives to be the definitional perimeters of the word "regulation", and this Court's power respecting the legal profession of this state, we feel it would be advantageous, preliminary to our inquiry into petitioner's First Amendment claims, to examine the existent schema of legislative and judicial action regarding the integration of Michigan's Bar. In so doing we hope to shed some light on the proper scope of the State Bar's authority over the attorneys of this state, as well as set the stage for our consideration of the constitutional issues raised by petitioner.

The first action toward integration of the Michigan Bar was taken by the Legislature through enactment of 1935 PA 58. This act, by its terms, "created" an integrated State Bar in Michigan, *i.e.*, a bar organization in which membership and payment of dues is required as a condition of practicing law in the state.[4] This act also authorized this Court

[4] See fn 1, *supra*.

"to provide for the *organization and regulation* of the state bar of Michigan; to provide *rules and regulations concerning the conduct and activities of the association and its members;* the schedule of membership dues therein, * * * non-payment of which shall be ground for suspension, the ethical standards to be observed in the practice of law, and the discipline, suspension or disbarment of association members."[6] (Emphasis supplied.)

That same year this Court promulgated a set of rules for the organization of the State Bar, stating in § 16 of those rules that it did so "pursuant to the powers of the court over the bar of the State and the members thereof", 273 Mich xlv (1935). Section 1 of those rules outlined in broad terms the purposes of the State Bar.

"The association [State Bar of Michigan] shall, under these rules, aid in the promotion of improvements in the administration of justice and the advancement of the science of jurisprudence, in the improvement of the relations between the profession and the public, and in the promotion of the interests of the legal profession in this State." 273 Mich xxxv (1935).[7]

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[6] The present version of this section is MCL 600.904; MSA 27A.904. There have been several substantive changes in this section, none of which, however, affect our discussion. The present version reads as follows:

"The supreme court has the power to provide for the organization, government, and membership of the state bar of Michigan, and to adopt rules and regulations concerning the conduct and activities of the state bar of Michigan and its members, the schedule of membership dues therein, the discipline, suspension, and disbarment of its members for misconduct, and the investigation and examination of applicants for admission to the bar."

[7] Section 1 of the State Bar Rules has undergone little change since its promulgation in 1935. In its present form it states, in relevant part:

"The state bar of Michigan shall, under these rules, aid in promoting improvements in the administration of justice and advancements in jurisprudence, in improving relations between the legal profession and the public, and in promoting the interests of the legal profession in this state." State Bar Rule 1, 340 Mich xxxviii (1954).

At this point we must recognize that petitioner has expressly disclaimed any assertion that the challenged activities are in violation of the State Bar's "internal constitution" (which we take to mean § 1 of the Rules Concerning the State Bar of Michigan, hereinafter sometimes called State Bar Rule 1 or Rule 1) and, apparently, would not contest the right of the State Bar to engage in these activities on behalf of voluntary contributors.[8] Petitioner having chosen, instead, to base his challenge to the objected-to activities on the First Amendment, it becomes unnecessary for us to dissect each of those activities in order to interpret precisely what falls within and what without the bounds of Rule 1. We therefore, for purposes of this case, will assume that the State Bar has authority under the lawfully delegated power of Rule 1 to perform the acts herein complained of. Nevertheless, since none of the complained-of State Bar activities were expressly provided for by either the Legislature in 1935 PA 58, or subsequent amendments to that section, or the judiciary in its rules concerning the State Bar, petitioner's constitutional challenge requires us to determine if these activities are constitutionally legitimate activities of the State Bar under the broad purposes enunciated in Rule 1. Of course, before we can undertake our First Amendment scrutiny, we must determine whether State Bar Rule 1 and the interests it advances are valid. It is to this consideration that we now turn.

In order to determine the validity of State Bar Rule 1, we must, to some extent, consider the respective powers of the Legislature and this Court

[8] In passing, we observe that if petitioner in referring to political activities had in mind the support of and opposition to partisan candidates and partisan issues, Rule 1 certainly does not sanction such activity, as the State Bar has properly recognized.

over attorneys of this state. In so doing, however, it would serve no useful purpose toward the resolution of this issue to become enmeshed in an abstract discussion of the precise measure of respective control that the Legislature and this Court could constitutionally exercise in this regard. It is sufficient for the purposes of our present discussion to recognize that courts have traditionally sought to harmonize their legitimate concerns with those of the Legislature. Thus while on the one hand courts are willing to acknowledge that the Legislature has a legitimate interest in the members of the bar because of its concern on behalf of the public interest and welfare, see *e.g., Button v Day,* 204 Va 547, 554; 132 SE2d 292, 297 (1963); *Detroit Bar Ass'n v Union Guardian Trust Co,* 282 Mich 707, 712; 281 NW 432 (1938), quoting from *In re Cannon,* 206 Wis 374, 397; 240 NW 441 (1932), the courts have been emphatic in recognizing their own peculiar and special interest in the conduct of attorneys since, as officers of the court by virtue of the practice of their profession (see GCR 1963, 908; MCL 600.901; MSA 27A.901), attorneys are " 'indispensable to the administration of justice and [are] intimate and peculiar in [their] relation to, and vital to the well-being of, the court' ". *Sams v Olah,* 225 Ga 497, 504; 169 SE2d 790, 798 (1969). See also *Button, supra,* 553-554; *In re Petition for Integration of the Bar of Minnesota,* 216 Minn 195, 199; 12 NW2d 515, 518 (1943). Thus courts have recognized in themselves an inherent power to regulate the practice of law and to supervise those engaged therein to the extent necessary for their proper functioning and generally find legislative regulation unconstitutional only when it tends to interfere with or impair the proper administration of judicial functions. *Guardian Trust Co, supra,* 713; *Olah, supra,* 501-502.

Thus in passing on the present conjunction of legislative and judicial action relating to the integration of the State Bar in Michigan, this Court has tempered its willingness to accord legislative enactments the proper degree of deference due a co-equal branch of government with a persistent insistence on its own inherent powers.[9] In *Ayres v Hadaway*, 303 Mich 589, 597-598; 6 NW2d 905 (1942), this Court stressed its own inherent power over attorneys of this state, while at the same time upholding the constitutionality of 1935 PA 58 against the contention that it violated due process since the court rules concerning the State Bar provided that inactive members of the bar were prohibited from practicing law. After citing several foreign jurisdictions on the subject of the inherent power of a court to regulate attorneys, this Court stated:

"In our opinion there is inherent power in the Supreme Court to regulate the qualifications of persons who may be permitted to practice law in this state. That the legislature has seen fit to adopt legislation [1935 PA 58] to this end does not make the act unconstitutional."

This Court reiterated, in more detail, essentially the same position almost two decades later when it held the State Bar's property in Lansing to be tax exempt public property in *State Bar of Michigan v Lansing*, 361 Mich 185, 194; 105 NW2d 131 (1960):

"The provisions of this act [1935 PA 58] are such as to clearly indicate that it was the intent of the legisla-

[9] In Michigan this inherent power derives in part from article 6, § 5 of our 1963 Constitution which states that:

"The supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state." See *In re Schlossberg*, 388 Mich 389, 395; 200 NW2d 219 (1972).

ture to provide for the organization of an agency that should function pursuant to rules and regulations prescribed by the Supreme Court for the purpose of performing, and assisting in the performance of *functions that, in the final analysis, pertain to the judiciary.* Clearly if such was not in the intention there would have been no attempt to invest this Court with the powers of organization and regulations obviously contemplated by the language of the statute.

• • •

"These are matters [matters pertaining to the discipline, suspension, or disbarment of members of the profession and the fixing of ethical standards to be observed in the practice of law] that relate to the public welfare and protection. *Likewise, they are matters within the scope of the inherent power of the judiciary."* (Emphasis supplied.)

Because there has been legislative action on the subject, there is no necessity for this Court to now assert inherent power to integrate the Bar independent of or contrary to legislative action.[10] See *Button v Day, supra,* 554.

As to whether State Bar Rule 1—with its broad injunction to "aid in promoting improvements in the administration of justice" etc. (as opposed to petitioner's narrowly construed "regulation")—is valid or not, we rule in the affirmative for two reasons. First, we believe that State Bar Rule 1 is consistent with the legislative purpose, expressed in 1935 PA 58, that this Court provide for the "regulation" of the State Bar and adopt "rules and regulations concerning the conduct and activities

[10] State Supreme Courts that have directly confronted the question of their inherent power to integrate their State Bars have, to the best of our knowledge, unanimously held themselves to possess such power. See, *e.g., Wallace v Wallace,* 225 Ga 102, 109-110; 166 SE2d 718, 723 (1969); *In the Matter of Integration of the Bar of Hawaii,* 50 Hawaii 107, 109; 432 P2d 887, 888 (1967); *In re Unification of the New Hampshire Bar,* 109 NH 260, 264; 248 A2d 709, 712 (1968).

of the association and its members". This Court stated as much in *Lansing, supra,* 194:

> "The rules and regulations that have been adopted are consistent with the legislative purposes, as disclosed by the act [1935 PA 58]."

Indeed, we know of no rule of statutory construction which would counsel this Court to interpret "regulation" in the narrow and confining sense petitioner advocates (remembering that we are not at this point addressing any constitutional implications of State Bar Rule 1). To provide the flexibility necessary to help this Court insure that the State Bar can achieve such worthy results as, to quote one state supreme court, " 'restor[ing] public confidence in the bar, enlarg[ing] professional consciousness, energiz[ing] the bar's responsibility to the public, * * * improv[ing] the administration of justice and [being] the only means presented whereby every member of the bar can share in its public and professional responsibility' ", *In re Unification of the New Hampshire Bar,* 109 NH 260, 267; 248 A2d 709, 714 (1968), quoting from *Petition of Florida State Bar Ass'n,* 40 So 2d 902, 909 (Fla, 1949), we believe the Legislature intended "regulation" to be defined expansively. *Cf.* the broad reading given the word "regulate" found in the Commerce Clause of the Federal Constitution, US Const, art I, § 8, cl 3. See *Virginia R Co v System Federation No 40,* 84 F2d 641, 650-651 (CA 4, 1936); *Chicago, M. SP & P R Co v Public Service Comm,* 332 Mich 291, 296; 50 NW2d 884 (1952).

Second, and independent of the above construction of the word "regulation", we do not doubt that this Court possessed the inherent power to include in its rules and regulations for the integra-

tion of the Bar the provisions of State Bar Rule 1. In fact, the provisions of State Bar Rule 1 represent a garden variety statement of the legitimate purposes of an integrated bar which other state supreme courts have either considered when making the decision to judicially integrate a bar, see *In re Unification of the New Hampshire Bar*, supra, 263-264, or which the courts themselves have adopted through the exercise of their inherent powers. See *Button*, supra, 555; *Application of the President of the Montana Bar Ass'n*, 163 Mont 523, 526-527; 518 P2d 32, 34 (1974); *Lathrop v Donohue*, 367 US 820, 828-829; 81 S Ct 1826; 6 L Ed 2d 1191 (1961).

IV. Constitutional Challenges

Having examined the authority and scope of the State Bar Rules, we now turn to petitioner's constitutional challenges. Petitioner maintains that his First Amendment rights are being violated by the State Bar's expenditure of mandatory dues for activities unrelated to the licensing, education and regulation of the legal profession. Although conceding that the state may require attorneys to belong to an integrated bar association, petitioner argues that the State Bar may not constitutionally expend funds on activities which "may [support] positions inconsistent with mine".

In order to analyze the constitutional validity of petitioner's claim, we must determine:

a) whether First Amendment rights are absolute;

b) what type of state interest justifies intrusion on First Amendment rights;

c) what means may the state employ to promote the permissible state interest;

d) does Bar Rule 1 embody a permissible state interest; and

e) are the 11 complained-of State Bar activities permissible means to promote the permissible state interest.

We find that the First Amendment is not absolute but will give way to certain state activities which are germane to a compelling state interest. The state has a compelling interest in promoting improvements in the administration of justice and advancing the science of jurisprudence in order to fulfill its function of protecting the health, safety and welfare of its citizens. The state may employ activities which are germane to this compelling state interest. We find that insofar as State Bar Rule 1 authorizes the Bar to "aid in promoting improvements in the administration of justice and advancements in jurisprudence" it embodies a permissible state interest. After carefully reviewing petitioner's 11 challenges, we also find that all but the last activity, regarding the use of the State Bar mailing list for commercial solicitations, are germane to the state's compelling interest.

A. Are First Amendment Rights Absolute?

The First Amendment states:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Supreme Court has long recognized that "[f]reedom of speech and of the press are fundamental rights which are safeguarded by the due process clause of the Fourteenth Amendment". *De*

Jonge v Oregon, 299 US 353, 364; 57 S Ct 255; 81 L Ed 278 (1937). See *Near v Minnesota ex rel Olson*, 283 US 697, 707; 51 S Ct 625; 75 L Ed 1357 (1931); *Gitlow v New York*, 268 US 652, 666; 45 S Ct 625; 69 L Ed 1138 (1925). In contrast to the rights of freedom of religion, speech, press, and assembly, the right to freedom of association is not expressly listed in the First Amendment. Nevertheless, "[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment". *NAACP v Alabama ex rel Patterson*, 357 US 449, 460; 78 S Ct 1163; 2 L Ed 2d 1488 (1958). It is thus clear that freedom of speech and of association are both protected under the First and Fourteenth Amendments.

However, the rights to free speech and association are not absolute. In *Konigsberg v State Bar of California*, 366 US 36, 49; 81 S Ct 997; 6 L Ed 2d 105 (1961), the Court "reject[ed] the view that freedom of speech and association • • • are 'absolutes' " and held that the denial of petitioner's application to the California Bar for failure to answer any questions pertaining to his membership in the Communist Party did not violate the First Amendment.[11] The Court reaffirmed this concept 12 years later in *United States Civil Service Comm v National Ass'n of Letter Carriers, AFL-CIO*, 413 US 548, 567; 93 S Ct 2880; 37 L Ed 2d 796 (1973). In upholding the prohibition of federal employees from taking an active part in political

[11] Justice Harlan pointed out: "the law relating to libel, slander, misrepresentation, obscenity, perjury, false advertising, solicitation of crime, complicity by encouragement, conspiracy, and the like" cannot be logically reconciled with the absolutist position. *Konigsberg*, *supra*, 49, fn 10. Even Justice Douglas conceded that the right to associate is not absolute. *Lathrop v Donohue*, 367 US 820, 882; 81 S Ct 1826; 6 L Ed 2d 1191 (1961) (dissent).

management or in political campaigns in accordance with § 9 of the Hatch act, 5 USC 7324(a)(2), Justice White acknowledged: "[n]either the right to associate nor the right to participate in political activities is absolute". That there are limits to the First Amendment's protection was recognized in *Buckley v Valeo*, 424 US 1; 96 S Ct 612; 46 L Ed 2d 659 (1976), where the Court declared that "[e]ven a ' "significant interference" with protected rights of political association' may be sustained if the State demonstrates a sufficiently important interest".[12] Thus it is clear that the rights of freedom of speech and association, while fundamental to our Constitution and society, are not absolute.

B. What Type of State Interest Justifies First Amendment Intrusion

Although the First Amendment is not absolute the state must demonstrate a particular type of interest to justify constitutional intrusions. The question which we must resolve is what type of state interest is necessary.

"To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong." *United States v O'Brien*, 391 US 367, 376-377; 88 S Ct 1673; 20 L Ed 2d 672 (1968).

For example, in affirming an order that injunctive relief be given to state government employees threatened with being discharged solely because

[12] *Buckley v Valeo*, 424 US 1, 25; 96 S Ct 612; 46 L Ed 2d 659 (1976) (upholding the limitation on, and reporting of, political contributions by the Federal Election Campaign Act of 1971, 2 USC 431 *et seq.*, but finding the limitation of independent and candidate expenditures violative of the First Amendment).

they were not affiliated with or sponsored by the Democratic Party, the Supreme Court held:

"It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny. *Buckley v Valeo*, 424 US, at 64-65; *NAACP v Alabama*, 357 US 449, 460-461 (1958). * * * Thus encroachment 'cannot be justified upon a mere showing of a legitimate state interest.' *Kusper v Pontikes*, [414 US 51, 58; 94 S Ct 303; 38 L Ed 2d 260 (1973)]. The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest." *Elrod v Burns*, 427 US 347, 362; 96 S Ct 2673; 49 L Ed 2d 547 (1976) (plurality).

Similarly when analyzing whether Illinois' state interest in protecting the effective right to participate in political primaries justified a state court injunction prohibiting a group of party members from acting as convention delegates the Supreme Court held:

"Even though *legitimate*, the '"subordinating interest of the State must be *compelling*" * * *' to justify the injunction's abridgment of the exercise by petitioners and the National Democratic Party of their constitutionally protected rights of association. *NAACP v Alabama*, 357 US 449, 463 (1958)." *Cousins v Wigoda*, 419 US 477, 489; 95 S Ct 541; 42 L Ed 2d 595 (1975).

Thus the First Amendment must yield to state intrusion when there is a compelling state interest present.

C. The Means Employed to Promote the Permissible State Interest

Having found that the state must show a compelling interest to justify First Amendment intrusion we must look to the appropriate *means* which the state may employ to achieve its compelling

interest. Where the intrusive limitation on association *directly* affects the First Amendment right of expression (here political expression), as where a statute precludes voting in one party's primary within 23 months after voting in another party's primary, *Kusper v Pontikes*, 414 US 51, 58-59; 94 S Ct 303; 38 L Ed 2d 260 (1973), or where not belonging to a particular political party results in discharge from a government job, *Elrod v Burns*, 427 US 347, 363; 96 S Ct 2673; 49 L Ed 2d 547 (1976) (plurality), the Court has adopted the strict, "least intrusive means" test.[13] In contrast, where the intrusive limitation on association *indirectly* affects the First Amendment right of expression, as where employees, though free to express their own views without limitation, are required to belong, and pay dues, to a union which may hold views different from the employees, *Abood v Detroit Board of Education*, 431 US 209, 225-226; 97 S Ct 1782; 52 L Ed 2d 261 (1977), the Supreme Court has applied the less restrictive "germane" test.[14]

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[13] For example, holding that the Illinois Election Code violated the First Amendment by prohibiting a person from voting in a primary election of a political party if that person had voted in another party's primary within the previous 23 months, Justice Stewart described when and how the least intrusive means test applies:

"[A] significant encroachment upon associational freedom cannot be justified upon a mere showing of a legitimate state interest. * * * For even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty. * * * If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties." *Kusper*, *supra*, 58-59.

[14] See also *Lathrop v Donohue*, 367 US 820, 843; 81 S Ct 1826; 6 L Ed 2d 1191 (1961), where the Supreme Court held:

"Both in purport and in practice the bulk of [the Wisconsin] State Bar activities serve the function * * * of elevating the educational and ethical standards of the Bar to the end of improving the quality of the legal service available to the people of the State, without any reference to the political process. It cannot be denied that this is a legitimate end of state policy. We think that the Supreme Court of

The most recent case in which the Supreme Court has taken a constitutional stand on the right of association is *Abood*. The Court upheld against First Amendment attack MCL 423.211; MSA 17.455(11) authorizing the use of agency shop clauses in collective bargaining agreements covering government employees, *Abood, supra,* 222, but overturned the use of mandatory dues for political purposes and for advancing ideological causes unrelated to collective bargaining. *Abood, supra,* 235-236. We note that the Court did not use the strict "least intrusive means" test in analyzing Abood's associational rights in either instance. Rather, the Court used the "germane" test and found that the Michigan Legislature had an "important governmental interest" in avoiding confusion which could arise from conflicting demands of rival teacher's unions; promoting labor peace; and preventing "free riders" from obtaining labor contract benefits without supporting bargaining expenses. *Abood, supra,* 224-225. The Court similarly found that the

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Wisconsin, in order to further the State's *legitimate interests* in raising the quality of professional services, may constitutionally require that the costs of improving the profession in this fashion should be shared by the subjects and beneficiaries of the regulatory program, the lawyers, even though the organization created to attain the objective also engages in some legislative activity. Given the character of the integrated bar shown on this record, in the light of the limitation of the membership requirement to the compulsory payment of reasonable annual dues, *we are unable to find any impingement upon protected rights of association.*" (Emphasis supplied.)

The plurality of four was unwilling to decide whether Lathrop's "rights of free speech are infringed if his dues money is used to support the political activities of the State Bar" because they felt the record was insufficiently developed. *Lathrop, supra,* 844-845. However, three justices would have found that none of the Wisconsin Bar's activities violated any of Lathrop's constitutional rights. *Lathrop, supra,* 848 (opinion of Harlan, J., Frankfurter, J., concurring); 865 (opinion of Whittaker, J., concurring in result). The other two justices who addressed the freedom of speech issue, would have prohibited Wisconsin Bar from using mandatory dues revenue to advocate positions which any of its members opposed. *Lathrop, supra,* 865 (opinion of Black, J.); 877 (opinion of Douglas, J.).

expenditure of *mandatory union dues* "for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes *not germane* to its duties as collective bargaining representative" violated the First Amendment right of union members who do not support such views, candidates of ideologies. Thus the Court's test in *Abood* was whether the expenditures were "germane to [the union's] duties as collective-bargaining representative".[15] Therefore we believe that the appropriate test to analyze petitioner's constitutional challenges is whether the state has a compelling interest involved, and if so, whether the Bar's complained-of activities are germane to that interest.[16]

D. Does Rule 1 Embody a Compelling State Interest?

The underlying question we must now address is whether "promoting improvements in the administration of justice and advancements in jurisprudence" is a compelling state interest? We find that it is. The United States Supreme Court implicitly recognized the state's compelling interest in promoting improvements in the administration of justice and advancements in jurisprudence in *Lathrop, supra,* 843, where Justice Brennan wrote:

"We think that the Supreme Court of Wisconsin, in order to further the State's *legitimate interests* in raising the quality of professional services, may constitutionally require that the costs of improving the profession in this fashion should be shared by the subjects and beneficiaries of the regulatory program, the law-

[15] *Abood, supra.*

[16] We have, of course, decided upon the rationale of germaneness to a compelling state interest. However, we believe that an integrated state bar would be the least intrusive means to effectuate the compelling state interest. See *Application of the President of the Montana Bar Ass'n,* 163 Mont 523, 526; 518 P2d 32, 33 (1974).

yers, even though the organization created to attain the objective also engages in some legislative activity. Given the character of the integrated bar shown on this record, in the light of the limitation of the membership requirement to the compulsory payment of reasonable annual dues, we are unable to find any impingement upon protected rights of association." (Emphasis supplied.)

In *Goldfarb v Virginia State Bar,* 421 US 773, 792-793; 95 S Ct 2004; 44 L Ed 2d 572 (1975), the Court explicitly recognized this legitimate state interest to be compelling:

"We recognize that the States have a *compelling interest* in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions. * * * *The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'* See *Sperry v Florida ex rel Florida Bar,* 373 US 379, 383 [83 S Ct 1322; 10 L Ed 2d 428] (1963); *Cohen v Hurley,* 366 US 117, 123-124 [81 S Ct 954; 6 L Ed 2d 156] (1961); *Law Students Research Council v Wadmond,* 401 US 154, 157 [91 S Ct 720; 27 L Ed 2d 749] (1971)." (Emphasis supplied.)

The fair and efficient use of the state legal system is paramount to the state's very existence. Without a legal system to make, interpret and enforce laws, without some mechanism to weigh and resolve conflicting claims, there is anarchy.

As officers of the court, lawyers play an indispensable role in the administration of justice. The state must not only protect its legal machinery from abuse through such safeguards as the attor-

ney grievance procedure but must also be mindful of the competence of attorneys, who are in a position to best assist, or most impede, the general public in securing justice. Authorizing the State Bar to aid the state in promoting improvements in the administration of justice is essential for the state's continued existence. Therefore we find that the state has a compelling interest in instructing that "[t]he state bar of Michigan shall, under these rules, aid in promoting improvements in the administration of justice and advancements in jurisprudence". We do not separately consider whether the state's interest "in improving relations between the legal profession and the public, and in promoting the interests of the legal profession in the State", State Bar Rule 1, are compelling.

With this determination in mind we now will examine petitioner's individual challenges to determine if the Bar activities are germane to the state's compelling interest.

E. Are the Bar Actions in the 11 Points Germane?

Petitioner attacks the following State Bar activities as violating his constitutional rights: (1) engaging in legislative and judicial lobbying and participating in other political activities (presumably supporting political candidates or state referendums); (2) requiring compulsory membership in the Young Lawyers Section; (3) promoting prepaid legal services; (4) supporting lawyer referral services; (5) aiding in lawyer placement; (6) maintaining a Client Security Fund; (7) promoting legal services and educating the public through pamphlets, magazines, radio and television advertisements of the availability and need of legal services; (8) funding Lawyers Wives of Michigan and Children's Charter of Michigan; (9) giving and paying for social functions, including receptions where the Supreme Court Justices are guests of

honor; (10) appearing before the State Officers Compensation Commission in support of higher Supreme Court, and other judicial, salaries; and (11) selling the use of the State Bar mailing roster to commercial interests. He bases the majority of his claims on the First Amendment right to freedom of association, with an occasional reference to the First Amendment's freedom of speech, religion and privacy;[17] the Commerce Clause;[18] and various

[17] Nowhere in either his complaint or brief does petitioner specifically allege a violation of his right to freedom of speech. However, since petitioner claims that the use of Bar dues for non-"regulation" purposes constitutes "a violation of [petitioner's] First Amendment rights" and places strong reliance on *Abood, supra*, we will analyze petitioner's charges in light of both his right of freedom of association and freedom of speech.

Petitioner argues that certain State Bar expenditures violate the First Amendment's prohibition on the establishment of religion:

"The use of State Bar dues monies to purchase alcoholic beverages, pork and shellfish for consumption at social functions, particularly when not all State Bar members are invited to such functions or offered alternatives of equal value for dues paid, and which are unnecessary to the accomplishment of any goal central to the viability of the State Bar as a regulatory body, violates the rights of petitioner and other State Bar members under the free exercise and establishment of religion clauses of the First Amendment."

Petitioner has failed to show any instance when *only* these objectionable foods and beverages were served. If a person attends a cocktail party, luncheon, or dinner, he or she may select nonobjectionable food and beverage to consume. For example, cocktail parties have nonalcoholic drinks, such as sodas, gingerale, fruit juices, tonic water, etc., in order to serve mixed drinks. Luncheons and dinners rarely serve only pork and shellfish. Even a vegetarian, whether for religious or health purposes, can find sufficient quantities of vegetables, cereals, baked goods and other nonmeat foods to form a nutritious meal. Petitioner, therefore, cannot complain that he is being forced to either consume objectionable victuals or go hungry. Nor may petitioner impose his religious views on proper consumption on others. Simply put, petitioner has the right to attend general Bar functions and choose from a reasonable selection of foods and beverages that which he finds satisfactory to consume. He does not, however, have the right to limit other Bar members to his self-imposed diet. By providing a reasonable selection of foods and beverages to its members the Bar cannot be accused of establishing or promoting any religion.

Petitioner's right to privacy argument is treated in section IV, E(11), *infra*.

[18] US Const, art I, § 8, cl 3. Petitioner argues that "[t]he Due

provisions of the Michigan Constitution.[19]

(1) Lobbying and Other Political Activity

The major complaint of petitioner is that the State Bar annually expends in violation of his First Amendment rights large sums of money for two related programs: (1) "for the purpose of influencing the legislation pending before the Michigan Legislature" and (2) "to fund study projects by its constituent committees which result in recommen-

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Process Clause of the Fourteenth Amendment in conjunction with the Commerce Clause requires that fees which affect interstate commerce must not be 'excessive in comparison with the governmental benefits conferred.' *Evansville-Vanderburgh Airport Authority Dist v Delta Airlines, Inc*, 405 US 707, 717; 92 S Ct 1349; 31 L Ed 2d 620 (1972) * * *. Moreover, the imposition of economic burdens on activities in interstate commerce must be 'reasonable and fixed according to some uniform, fair and practical standard'. *Hendrick v Maryland*, 235 US 610; 35 S Ct 140; 59 L Ed 385 (1915)".

We recognize that the practice of law may be subject to the Commerce Clause in certain instances, see *Goldfarb v Virginia State Bar*, 421 US 773, 785; 95 S Ct 2004; 44 L Ed 2d 572 (1975) (minimum fee schedules published by county bar association and enforced by state bar violated § 1 of the Sherman act, 15 USC 1). However, petitioner has failed to show how the expenditure of State Bar mandatory dues for the promotion of the administration of justice is either excessive or a burden on interstate commerce. Therefore we find petitioner's claim to be spurious.

[19] Petitioner claims that 1) "[t]he use of State Bar dues monies for 'public' purposes not germane to its regulatory functions [as narrowly defined by petitioner] violates the title-body clause, Const 1963, art 4, § 24" [Petitioner's Brief, p 8]; 2) that such use "is illegal as * * * not having been authorized pursuant to the procedure required by Const 1963, art 4, § 30" to expend public money for a private purpose; and 3) that "[t]he Supreme Court lacks the power to authorize use of State Bar dues for non-regulatory purposes. * * * [T]o purport to authorize expenditures for additional purposes * * * would run afoul of the separation of powers principle ensconced in Const 1963, art 3, § 2".

Having recognized that this Court has the inherent power to regulate the legal profession in addition to any legislative authorization and having further found promulgation of State Bar Rules to be a valid exercise of that power, we reject petitioner's assertions as to the title-body clause, find that the Bar expenditures are for a public purpose, and rule that there is no violation of the separation of powers clause.

dations of policies to be adopted publicly by officials and agencies of the State of Michigan through executive or legislative or administrative action". Expenditures for the various committees reviewing the Michigan Land Title Standards and Criminal Code and Criminal Procedure Code, for the committee considering this Court's proposed Rules of Evidence, and to support the Bar's prison paralegal project are cited by petitioner as examples of improper use of Bar dues monies. There is nothing on the record to indicate Bar participation in partisan politics. But see fn 8.

Petitioner maintains that the Bar may only disburse its funds for "regulation" purposes. As aforementioned, part I, *supra*, petitioner limits "regulation" to "bar grievance activities, the expenses of the character and conduct committee, and subsidies paid to the Institute for *[sic:* of] Continuing Legal Education (ICLE), plus associated administrative and other overhead expenses". Petitioner argues that any other expenditure of mandatory Bar dues monies violates the First Amendment's right to freedom of association since membership in the Michigan State Bar Association is a prerequisite to the practice of law in this state.

Petitioner supports his position by claiming: "*Abood* controls the instant case and mandates a ruling in petitioner's favor." His argument is: "Conceptually, the State Bar of Michigan is a union shop.[9] This fact was implicitly recognized in *Abood*". He then states: "The specific holding in

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[9] "Under a union-shop agreement, an employee must become a member of the union within a specified period of time after hire, and must as a member pay whatever union dues and fees are uniformly required." *Abood*, *supra*, 217, fn 10. See 43 Words and Phrases, Union Shop, p 494.

Abood is that the employees of an agency shop[21] who object to the use of agency shop fees for political activity are entitled to a pro rata reduction in their fee assessment equal to the proportion *ideological expenditures* bear to the total union budget" (emphasis supplied).

The exact words of the Court in *Abood*, in pertinent part, follow:

> "We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward *the advancement of other ideological causes not germane to its duties as collective-bargaining representative*. Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment." (Emphasis supplied.) *Abood, supra*, 235-236. (Footnotes omitted.)

The significant language in the quotation from the Court's opinion is in italics, because it indicates the difference between what the Court held and what petitioner asserts. The Court proscribed expenditures of dues money for *"the advancement of other ideological causes not germane to its duties as collective-bargaining representative"*, whereas petitioner speaks of *"ideological expenditures"* without any limitation. The difference, of course, is whether the ideological expenditure was or was not "germane" to the state's compelling interest.

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[21] An agency shop is an "arrangement, whereby every employee represented by a union—even though not a union member—must pay to the union, as a condition of employment, a service fee equal in amount to union dues". *Abood, supra*, 211. See 2A Words and Phrases (1978-1979 Supp), Agency Shop, pp 73-74.

The significance of this distinction is emphasized by a quotation from the *Abood* Court as follows:

"An employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative. * * * To be required to help finance the union as a collective-bargaining agent might well be thought, therefore, to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit. But * * * such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." *Abood, supra,* 222.

It is obvious from our analysis thus far that all ideological expenditures are not necessarily in derogation of compulsory membership First Amendment rights and that the Court's critical test is whether the ideological expenditure is or is not "germane" to the state interest. This leaves the ultimate inquiries first, what is the compelling state interest, and second, whether the ideological expenditure is "germane" to that interest.

We have already considered and developed the state's interest in the administration of justice and in the advancement of jurisprudence. As a consequence we have a clear concept of what the state's compelling interest is in this case.

Our next inquiry therefore is whether or not the complained-of action here is "germane" to the administration of justice and the advancement of jurisprudence. "Lawyers, as members of an ancient and honorable profession, have a duty to utilize their training and experience in rendering

service to the public."[22] The state has a valid interest in drawing upon this training and experience in order to promote improvements in the administration of justice and to advance jurisprudence.[23] The better attuned the legal machinery is to the public's needs of health, safety and welfare, the better the state will be able to perform its job of protecting and serving the public. The input and feedback on proposed legislation and court rules is invaluable to the state in fine-tuning its legislative and judicial systems.[24] The State Bar's 44 standing committees and 12 special committees ensure that the collective experience of legal ex-

[22] *In the Matter of the Florida Bar Board of Governors' Action on Adoption of Proposed New State Constitution*, 217 So 2d 323, 324 (Fla, 1969). See Roscoe Pound, The Lawyer from Antiquity to Modern Man (St Paul: West Pub, 1953).

[23] Justice Harlan noted how important input from the legal profession is to the legislative and judicial branches:

" '[T]he composite judgment of the members of the bar of the state on measures directly affecting the administration of justice and the practice of law' *[Lathrop v Donohue*, 10 Wis 2d 230, 239-240; 102 NW2d 404 (1960)] may well be as helpful and informative to a state legislature as the work of individual legal scholars and of such organizations as the American Law Institute, for example, is to state and federal courts. * * * The function such groups serve is a rationalizing one and their power flows from and is limited to their ability to convince by arguments from generally agreed upon premises. They are exercising the techniques and knowledge which lawyers are trained to possess in the task of solving problems with which the legal profession is most familiar. The numberless judicial citations to their work is proof enough of their own usefulness in the judicial decision-making process.

"Legislatures too have found that they can benefit from a legal 'expert's effort to improve the law in technical and noncontroversial areas.' *Dulles v Johnson*, 273 F2d 362, 367 [CA 2, 1959]. In the words of the Executive Secretary of the New York Law Revision Commission, there are areas in which 'lawyers as lawyers have more to offer, to solve a given question, than other skilled persons or groups.' [MacDonald, *Foreword to the Symposium,]* 40 Cornell L Q 641, 644 [1955]. See also Cardozo, *A Ministry of Justice*, 35 Harv L Rev 113 [1921]." *Lathrop, supra*, 863 (Harlan, J., concurring).

[24] "The office of attorney is indispensible to the administration of justice and is intimate and peculiar in its relation to, and vital to the well-being of, the court." 7 CJS, Attorney and Client, § 4, p 802, quoted with approval in *Sams v Olah*, 225 Ga 497, 504; 169 SE2d 790, 798 (1969).

perts in many fields will be voiced in the legislative and judicial process to promote improvements in the administration of justice and the advancement of jurisprudence.[35] In this manner the Legislature and Court can better arrive at a fair, effective and efficient result. Thus the state's need in receiving input and feedback from the Bar on appropriate proposed legislation and court rules is germane to its compelling interest in promoting improvements in the administration of justice and the advancement of jurisprudence.

Without more we hold that the State Bar's use of money, including some of petitioner's, to influence legislation and to fund committee study projects looking to that result is "germane" to the state's legitimate and compelling interest in the administration of justice and the advancement of jurisprudence with the result that such activity survives First Amendment attack and that there is nothing in *Abood* to the contrary.

In passing, however, some comment might be in order on petitioner's misunderstanding of *Abood*. *Abood*, like its predecessors,[36] involved a labor

[35] For example the Revision of Criminal Procedure Special Committee helps draft and critique "proposed codification of all laws and court rules pertaining to criminal procedure". Bylaws of the State Bar of Michigan, art V, 59 Michigan Bar J 49r, 54r (April, 1980). See also the Special Committees on the Criminal Code Revision and the Standard Criminal Jury Instructions and the Standing Committees on Civil Procedure and Legislation. *Id.*, 52r-54r. By obtaining input from members of both plaintiffs' and defendants' bar this Court has had a strong foundation upon which to build a comprehensive judicial system. However, any expenditures toward objectives other than the administration of justice or the advancement of jurisprudence, such as promotion of sports or arts, would be offensive both to Rule 1 and petitioner's First Amendment rights.

[36] See *Brotherhood of Railway & Steamship Clerks v Allen*, 373 US 113; 83 S Ct 1158; 10 L Ed 2d 235 (1963) (manifestation of opposition to any political expenditure of union shop dues is sufficient to state a cause of action); *International Ass'n of Machinists v Street*, 367 US 740, 768; 81 S Ct 1784; 6 L Ed 2d 1141 (1961) (Railway Labor Act, 45 USC 152[11], held to permit compulsory union dues only for collective

union. The case at bar, like *Lathrop v Donohue*,[22]

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bargaining purposes and not for partisan political purposes); *Railway Employes' Dep't v Hanson*, 351 US 225; 76 S Ct 714; 100 L Ed 1112 (1956) (Railway Labor Act, *supra*, upheld against First and Fifth Amendment challenges).

[22] 367 US 820; 81 S Ct 1826; 6 L Ed 2d 1191 (1961) (Wisconsin integrated Bar is not unconsistutional insofar as it merely requires lawyers practicing within the state to become members and pay reasonable annual dues). We reject petitioner's claim that *Abood* essentially overruled *Lathrop*. Justice Stewart, writing for the majority, noted that the Court could not avoid making a ruling in *Abood* on the constitutionality of using mandatory union dues for political and ideological purposes as they had in *Street*. He then footnoted the following observation:

"In *Lathrop v Donohue*, 367 US 820, a companion case to *[International Ass'n of Machinists v] Street* [367 US 740; 81 S Ct 1784; 6 L Ed 2d 1141 (1961)], a lawyer sued for the refund of dues paid (under protest) to the integrated Wisconsin State Bar. The dues were required as a condition of practicing law in Wisconsin. The plaintiff contended that the requirement violated his constitutionally protected freedom of association because the dues were used by the State Bar to formulate and to support legislative proposals concerning the legal profession to which the plaintiff objected.

"A plurality of four Justices found that the requirement was not on its face unconstitutional, relying on the analogy to *[Railway Employes' Dep't v] Hanson* [351 US 225; 76 S Ct 714; 100 L Ed 1112 (1956)]. And the plurality ruled, as had the Court in *Hanson*, that the constitutional questions tendered were not ripe, for the Court was nowhere 'clearly apprised as to the views of the appellant on any particular legislative issues on which the State Bar has taken a position, or as to the way in which and the degree to which funds compulsorily exacted from its members are used to support the organization's political activities.' 367 US, at 845-846. The other five Members of the court disagreed with the plurality and thought that the constitutional questions ought to be reached. Three Justices would have upheld the constitutionality of using compulsory dues to finance the State Bar's legislative activities even where opposed by dissenting members. See *id.*, at 848 (Harlan, J., concurring in judgment); *id.*, at 865 (Whittaker, J., concurring in result). The other two Justices would have held such activities to be unconstitutional. See *ibid.* (Black, J., dissenting); *id.*, at 877 (Douglas, J., dissenting).

"The only proposition about which a majority of the Court in *Lathrop* agreed was that the constitutional issues should be reached. However, *due to the disparate views of those five Justices on the merits and the failure of the other four Members of the Court to discuss the constitutional questions, Lathrop does not provide a clear holding to guide us in adjudicating the constitutional questions here presented." Abood v Detroit Board of Education*, 431 US 209, 233, fn 29; 97 S Ct 1782; 52 L Ed 2d 261 (1977) (emphasis added).

Thus the Supreme Court did not overrule *Lathrop* but merely noted in passing that the plurality opinion was not based on constitutional

deals with an integrated bar association.

While there are superficial similarities between an integrated state bar and a labor union, that is not the question. The question is whether the compelling state interest justifying intrusion on First Amendment rights is the same in both cases. The answer is an emphatic negative. In *Abood* the compelling state interest is achieving labor peace through collective bargaining. In an integrated bar the compelling state interest is the administration of justice. Obviously what might be germane to collective bargaining could be quite different from what is germane to the administration of justice. A labor union, for example, would at the most have indirect interest in improvement of court rules, whereas an integrated state bar could have intense interest in such rules.

Further, we note that petitioner in his original brief does not maintain that he holds political or ideological views contrary to those of the State Bar. Petitioner broadens his argument somewhat in his Reply Brief, p 40, when he states: "Public interest is not a unitary concept * * *; the State Bar officers have their view and plaintiff has his. Plaintiff cannot be required to underwrite the expense of the former in promulgating their views". However, petitioner failed to specify even one conflicting view but noted instead: "plaintiff does not seek to prohibit the State Bar from lobbying, [but] merely from spending plaintiff's money to do so". Therefore petitioner's challenges appear to be monetary rather than ideological.

However, even assuming petitioner has strong ideological objections to certain State Bar positions, he "is still free to voice his own views on

grounds and therefore, like *Street*, could be of no precedential guidance.

any subject in any manner he wishes". *In re Unification of the New Hampshire Bar,* 109 NH 260, 266; 248 A2d 709, 713 (1968); accord, *Lathrop, supra,* 861 (Harlan, J., concurring in result).[28] He is not being forced to proclaim any ideological or political view. As Justice Harlan noted in his concurrence in *Lathrop, supra,* 859, "Surely the Wisconsin Supreme Court is right when it says that petitioner can be expected to realize that 'everyone understands or should understand' that the views expressed are those 'of the State Bar as an entity separate and distinct from each individual.' *[In re Integration of the Bar,* 5 Wis 2d 618, 623; 93 NW2d 601, 603 (1958)]." More importantly, petitioner has many avenues open to him to express his ideas either through the Bar or outside of it. Petitioner may or may not wish to run for election to the Board of Commissioners or the Representative Assembly (see State Bar Rules 5 and 6), but in any event he may attend their meetings, since unless specifically voted to be closed all meetings are open to Bar members. In this way he can have direct input on the two governing bodies of the Bar. Similarly if petitioner has an interest in the Michigan Rules of Evidence, Criminal Code, Land Title Standards or other legislation and rules which the Bar reviews, he may attend the committee meetings and make known his feelings. Petitioner is also free to write letters to the editor of the Michigan Bar Journal

[28] In addressing the two dissenting opinions in *Lathrop,* Justice Harlan noted:

"I do not understand why it should become unconstitutional for the State Bar to use appellant's dues to fulfill some of the very purposes for which it was established. I am wholly unable to follow the force of reasoning which, on the one hand, denies that compulsory dues-paying membership in an Integrated Bar infringes 'freedom of association,' and, on the other, in effect affirms that such membership, to the extent it entails the use of a dissident member's dues for legitimate Bar purposes, infringes 'freedom of speech.' " *Lathrop, supra,* 850.

expressing his views and seeking support. If he chooses not to take part in the channels of communication within the Bar and is dissatisfied with the majority position petitioner may express and promote his views through external means such as the communications media.

In sum we find that the State Bar expenditures of dues revenues to fund committees for the purpose of examining proposed legislation and court rules is germane to the state's compelling interest in promoting the administration of justice and advancement in the science of jurisprudence. When taking a position on a proposed bill, rule, or order, the State Bar, however, must confine itself to those subjects directly affecting the administration of justice or the advancement of jurisprudence.[29] Since petitioner has failed to show and we cannot find in the record any specific expenditure of Bar funds to critique or lobby for any legislative or judicial action unrelated to the administration of justice we find that petitioner's rights are not unconstitutionally infringed.

(2) The Young Lawyers Section and the Right of Association

Petitioner also challenges the constitutionality of the automatic membership of newly admitted attorneys in the Young Lawyers Section (YLS). He contends that such "compulsory" membership violates his First Amendment right to freedom of association since he is being forced to join an organization without his consent and since a part

[29] Thus endorsing a particular candidate for office or lobbying for a bill which is unrelated to the improvement of the administration of justice is outside the scope of State Bar Rule 1 and also violates the First Amendment rights of free speech and association. See fn 8, *supra*.

of his mandatory Bar dues supports the YLS. The State Bar argues that "[n]obody is forcing petitioner to participate in the Young Lawyers Section nor to associate with other young lawyers". The Bar relies on *Lathrop, supra*, 827-828, where the majority of the Justices of the Supreme Court agreed that the Wisconsin State Bar did not, on its face, violate the right to freedom of association, noting: " '[H]is compulsory enrollment imposes only the duty to pay dues' " (367 US 827-828, quoting 10 Wis 2d 237 with approval).

We agree with the State Bar that "there is a definite professional/justice system interest in the integrating of young and new lawyers into the practice of law, and in dealing with the very special problems of these new professionals. Such a structure benefits not only the new attorney, but safeguards the public interest in the maintenance of the highest standards in the practice of law". Petitioner argues that newly admitted lawyers know more general, substantive law and are better "attuned to the most modern currents of thought in the law" than experienced practitioners. It is obvious, however, that most new attorneys necessarily have a substantial gap of practical knowledge and experience. Despite the trend to expose law students to various clinical experiences, law schools still emphasize traditional textbook courses, reasoning that the student will acquire the necessary practical and procedural knowledge after being admitted to the bar. We take judicial notice that a person is not automatically transformed from a struggling student to a skilled legal practitioner upon completion of the Bar admissions ceremony. The Young Lawyers Section can help the new attorney bridge the gap between law school and the practice of law.

Helping young attorneys find their way through

the maze of rules, regulations and laws in turn helps the legal system run effectively and provides for a better distribution of legal services to the public. If petitioner feels that he does not require this valuable aid he is free to disassociate himself from the Section: automatic membership does not mean that it is compulsory.[30] Petitioner, therefore, cannot constitutionally complain that the State Bar uses a portion of its general fund to support a section which is composed of young lawyers who voluntarily give their time and energy to sponsor seminars and programs to train the new attorney. Thus we find that ensuring that the legal system runs smoothly and efficiently is germane to the state's compelling interest of promoting improvements in the administration of justice.

(3) Prepaid Legal Services (4) Lawyer Referral

(5) Lawyer Placement (6) Client Security

The use of mandatory dues revenues for sponsoring Lawyer Referral, Prepaid Legal Services, Lawyer Placement and the Client Security Fund is also challenged by petitioner. His primary argument against such expenditures is that they do not constitute a public purpose and have not been authorized in accordance with the provisions of Const 1963, art 4, § 30.[31] Petitioner insists that

[30] Indeed, a Bar applicant could notify the YLS prior to the admissions ceremony of his wish not to become a section member, thereby never being "forced" to join the section. Or a newly admitted attorney can become a member for a trial period and, if dissatisfied, terminate membership.

[31] The State Constitution provides:

"The assent of two-thirds of the members elected to and serving in each house of the legislature shall be required for the appropriation of public money or property for local or private purposes." Const 1963, art 4, § 30.

Since we have based the Bar's authority to promote the improve-

"[t]he use of State Bar dues monies to enhance the income producing opportunities, employability, and to guarantee trustworthiness of practitioners (via Client Security Fund), is thus invalid as not for a public purpose".[22] A secondary argument raised by petitioner is the all-inclusive charge that the First Amendment right of association prohibits any use of mandatory Bar dues revenue for non-"regulation" purposes.

As to the first argument that the expenditure of Bar funds for the challenged activities is not for a public purpose we note that petitioner's analysis of the purpose of the Bar program is inadequate. Except perhaps for the Lawyer Placement Service, none of the programs were instituted nor are presently conducted primarily for the benefit of attorneys even though, admittedly, some attorneys may benefit incidentally. Lawyer Referral and Prepaid Legal Services[23] were created in order to

ment in the administration of justice and advancement in jurisprudence upon State Bar Rule 1 we will not address plaintiff's attack on the constitutionality of MCL 600.901 *et seq.*; MSA 27A.901 *et seq.* See fn 19, *supra*.

[22] When asked to explain his objections to the Lawyer Referral Service, however, petitioner stated:

"I don't understand why I should be required to subsidize the income-producing opportunities of the attorneys in private practice when I have no interest in enhancing my own income-producing opportunities.

"*Q:* So it is your own economic interest that is the touchstone of this objection, is that correct?

"*A:* Yes, and the fact that an agency of the state for which I work precludes me from taking advantage of the service that I am required to subsidize."

[23] Lawyer Referral Service provides members of the public with the opportunity to consult with an attorney for a half an hour for a $15 fee to determine whether a legal problem exists, whether the problem merits further action by an attorney or whether it may be satisfactorily settled by the client. Thus a person seeking a divorce may be referred to an attorney, randomly selected from a list of lawyers competent in that area who agree not to charge over a set amount, while someone wanting to change his or her name would likely be instructed to go to probate court.

Prepaid Legal Services is analogous to Blue Cross insurance in that

make legal services more accessible to "that segment of the population, which studies have shown runs roughly around 70 percent, who do not consult lawyers for one reason or another, partly out of fear of the unknown and of how much lawyers would charge" (testimony of Michael Franck, Executive Director of the Michigan State Bar). See *Bates v State Bar of Arizona*, 433 US 350, 370, fn 22; 97 S Ct 2691; 53 L Ed 2d 810 (1977). Similarly the purpose of the Client Security Fund is not to insure attorneys for malpractice but to protect the public by reimbursing victims of a defalcation either by clients of lawyers or by a lawyer acting in a fiduciary capacity.[34] Therefore Lawyer Referral, Prepaid Legal Services and the Client Security Fund clearly constitute a permissible public service, rather than a private or local service, within the meaning of Const 1963, art 4, § 30.

As to petitioner's First Amendment argument

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an annual premium is usually paid by an employer and/or employee ensuring that up to a fixed amount of legal services would be available should the need arise. The purpose of Prepaid Legal Services is essentially the same as of Lawyer Referral in that both programs help deliver legal services to members of the public who otherwise might lack legal advice except that Prepaid Legal Services is more extensive in its scope of coverage.

[34] Petitioner admits that the Client Security Fund benefits the public but complains that it does not aid the general welfare of lawyers, "many of whom, like petitioner herein, either do not engage in professional activity related to the protective function of the Client Security Fund, or are precluded from doing so by the State as employer".

Petitioner would have this Court create a mandatory Bar Rule requiring private practitioners obtain insurance to replace the Client Security Fund.

There is a problem that the present malpractice insurance coverage, and indeed the whole concept of insurance, does not include protection for an intentional wrong. As Mr. Franck noted:

"[M]alpractice insurance, by the terms of all the policies, specifically excludes intentional misconduct and only covers errors and omissions to use a general term, so that claims that are eligible for payment by the Client Security Fund would, by definition, not be eligible for coverage under professional liability insurance."

relative to these services, since they either provide legal assistance to those who would otherwise be without it or protect those who do employ lawyers, the relationship to the administration of justice is clear and hence germane to a compelling state interest.

The Lawyer Placement Service presents a closer issue. For a fee of $5 any attorney, newly admitted or an experienced practitioner, may register with the Placement Service for up to 12 months, or until employment is secured. Employers searching for attorneys with certain qualifications are charged a $10 registration fee. The Placement Service acts as an information clearinghouse, gathering application forms and job descriptions and passing the collected information on to the registrants.

Petitioner objects to the State Bar subsidizing the postage, printing, staff and building space of the Placement Service. He perceives this service as being a private purpose within the meaning of Const 1963, art 4, § 30 since at any one time it only benefits a relatively few attorneys. Petitioner claims that Lawyer Placement is just another unnecessary service of the Bar which he is being unconstitutionally compelled to support in violation of his First Amendment right of freedom of association.

Lawyer Placement provides a necessary and useful service for the legal profession and the general public. By providing a focal point for the gathering and dispersal of employment information, the Bar program aids attorneys and society in efficiently utilizing legal skills and services. Placing attorneys where legal services are required aids in the administration of justice. As a consequence, Lawyer Placement, which facilitates

locating attorneys where needed, is germane to the administration of justice.

(7) Informing the Public of their Legal Rights and Responsibilities

(8) Lawyers Wives and Children's Charter

Petitioner also objects to the use of Bar funds to promote legal services and to inform the public of the availability and need of legal services. He similarly objects to the use of Bar revenues to fund Lawyers Wives[36] and Children's Charter.[38] Petitioner claims that the use of mandatory Bar dues monies to promote the above activities violates his First Amendment right of association. For example, petitioner, as an unmarried attorney, has no interest in Lawyers Wives whatsoever. Being an attorney, petitioner would also have no need to be informed of the availability of legal services. Nevertheless we hold that the services performed by Lawyers Wives, Children's Charter

[36] Lawyers Wives of Michigan, composed of spouses of both male and female attorneys,

"is an organization which provides a home * * * for spouses of those in our profession. Its particular interest and activity has been in the area of law related education."

Lawyers Wives distributes the booklet "You and the Law" to junior high school students throughout the state; conducts an annual Law Day essay contest for junior high school students; and provides volunteer services in probate and juvenile court.

[38] Children's Charter of Michigan

"is a Michigan non-profit corporation which is essentially a consortium of juvenile judges, social workers and officers assigned to juvenile work in the various police departments throughout the state, including the Michigan State Police. They deal with collective problems of juvenile delinquency and other juvenile problems that require the interjection of third parties in the process, including non-status offenders. They meet regularly during the summer months at regional conferences to hear papers, to discuss issues and to educate one another on the subject. * * * The contribution has been fixed at $1,000, as Mr. Franck has testified, for some years, in order to underwrite the cost of these conferences which consist of travel for the speakers and renting of the hall."

and the Bar public education communications are germane to the state's interest in improving the administration of justice.

A legal system, no matter how fair or just, is of little value if no one knows of its existence or how to effectively use it. By providing the public with pamphlets explaining various areas of the law in easily understandable language the State Bar is helping Michigan citizens gain effective access to the legal system. Similarly when Lawyers Wives volunteer their time and effort to distribute brochures to school children, conduct Law Day essay contests and serve probate and juvenile courts they are aiding the state legal system. We therefore find that the expenditure of State Bar dues revenue on public communication, Lawyers Wives and Children's Charter is germane to the state's compelling interest in promoting improvements in the administration of justice and advancements in the science of jurisprudence.

(9) State Bar Social Functions and Judicial Attendance

Petitioner claims the State Bar violates his First Amendment rights of association by expending some of his mandatory dues on offering food and beverages on particular occasions such as the State of the Judiciary Address and Law Day. He also complains that justices and other judges improperly are present at some of these occasions.

To begin with, there is no original jurisdiction in this Court to consider the alleged judicial improprieties, and petitioner is advised to seek the proper forum.

The problem of juxtaposing the majesty of the First Amendment with a minor complaint such as

petitioner's about the offering of food and beverages is that there is a danger of focusing on whether the minor activity rises to the dignity of being a compelling state interest, which, of course, it is not. The pertinent question, however, is whether the minor activity is germane to a more significant activity which fulfills a compelling state interest.

Obviously one can easily imagine dining occasions which have no relationship to the administration of justice or the advancement of jurisprudence whatsoever. Expenditure of funds for these would be offensive not only to the First Amendment but Rule 1. On the other hand, there are other dining occasions that support activities germane to the State Bar's performance of its duties in the improvement of the administration of justice and the advancement of jurisprudence. With that in mind let us focus, for example, on one of petitioner's objections, dining functions in connection with Law Day.

We can take judicial notice that in connection with Law Day there is an essay contest about law-related subjects for young students. The statewide winners, their parents and teachers are brought to Lansing to a Bar-sponsored luncheon attended by prominent attorneys and judges. The highlight of the occasion, of course, is the presentation of awards to the young winners.

Is the use of mandatory bar dues monies for such an occasion germane to the administration of justice? We have already determined that educational programs acquainting the public with the operation and availability of the justice system is germane to the administration of justice. A luncheon of the kind just described is certainly a legitimate expense in the fulfillment of such an

objective and therefore germane to the administration of justice.

We therefore hold that expenditure of mandatory bar dues for the holding of social functions by the State Bar is not per se an invasion of petitioner's First Amendment rights. Such expenditures may be constitutionally permissible if in support of a social function which is a legitimate part of a Bar activity germane to the administration of justice or the advancement of jurisprudence. For example, those in connection with the State of the Judiciary Address and Law Day, if otherwise proper, do not offend petitioner's First Amendment rights.

(10) Support of Judicial Salaries Before SOCC

Petitioner argues that the appearance by State Bar representatives before the State Officers Compensation Commission (SOCC) to support higher judicial salaries, including salaries of members of this Court, is unlawful and improper. Petitioner claims that the expenditure of Bar resources to send a person to the SOCC is unnecessary to the Bar's "regulatory" function and therefore violates his First Amendment rights of association and speech. He also argues that permitting the State Bar to lobby for higher wages for judges is improper since it violates Canon 2(A) of the Michigan Code of Judicial Conduct[37] as constituting an appearance of impropriety. As to this last objection, we have already indicated that the Supreme Court

[37] Canon 2(A) states:

"Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. He must expect to be the subject of constant public scrutiny. He must therefore accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly."

is an inappropriate forum in which to initiate such a complaint.

Employment of competent jurists is essential for the effective administration of justice. We take judicial notice that several years ago this country was concerned with the number of eminent federal judges who were resigning due to inadequate salaries. Congress has repeatedly found it necessary to raise the salary of federal judges in order to not only attract, but retain, the top minds of the legal profession who would otherwise engage in private practice. The Michigan Legislature established the SOCC to ensure that top positions in the public sector, such as judges, would be able to compete with the private sector for well qualified and dedicated men and women. By paying competitive salaries the SOCC ensures that the state is not handicapped in drawing and maintaining able jurists. We see nothing improper in the State Bar aiding the state in determining what salaries are necessary to have an effective judiciary, "for the labourer is worthy of his hire". Luke 10:7.

Permitting the State Bar to express its position concerning increases in judicial salaries, whether in favor or opposed, is germane to the state's compelling interest in the administration of justice.

(11) Use of State Bar's Mailing List for Commercial Purposes

Finally, petitioner contests the use by the State Bar of its mailing list for commercial purposes. He maintains that he is an unwilling recipient of "junk mail" resulting from State Bar commercial mailings in violation of his right to privacy. The Bar admits that it mails insurance and travel company solicitations to Bar members but claims

that it carefully screens the use of the list and takes various safeguards, such as never allowing the list to leave its possession, to ensure that only commercial offers of interest to the general membership will be mailed. Respondent also insists that "both the individual attorney and the State Bar receive a benefit from the programs" since the Bar is totally reimbursed for its mailing service while "individual attorneys receive the benefit of group rates which would otherwise be unavailable". Finally the Bar maintains that there is no right not to receive mail, claiming that the right to privacy does not apply here in any event: "[A]ny intrusion is minimal inasmuch as anyone not wishing to receive such mail may certainly disgard it without opening it, since the nature of the communication is clearly indicated on the outside of the envelope".

We disagree. *Rowan v United States Post Office Dep't*, 397 US 728; 90 S Ct 1484; 25 L Ed 2d 736 (1970), which upheld Title III of the Postal Revenue and Federal Salary Act of 1967, 39 USC 4009, now recodified as 39 USC 3008,[38] against constitutional attack, provides guidance on this issue. Although the challenged statute was enacted in order to give recipients of obscene mail the power

[38] The recodified statute, virtually unchanged from its predecessor, states:

"(a) Whoever for himself, or by his agents or assigns, mails or causes to be mailed any pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative shall be subject to an order of the Postal Service to refrain from further mailings of such materials to designated addresses thereof.

"(b) Upon receipt of notice from an addressee that he has received such mail matter, determined by the addressee in his sole discretion to be of the character described in subsection (a) of this section, the Postal Service shall issue an order, if requested by the addressee, to the sender thereof, directing the sender and his agents or assigns to refrain from further mailings to the named addressees." 39 USC 3008, subds (a) and (b).

to remove their names from such mailing lists, *Rowan, supra,* 731-734, the Supreme Court took a broader approach. Chief Justice Burger, writing the opinion for the unanimous Court, noted:

"Without doubt the public postal system is an indispensable adjunct of every civilized society and communication is imperative to a healthy social order. But the right of every person 'to be let alone' must be placed in the scales with the right of others to communicate.

"In today's complex society we are inescapably captive audiences for many purposes, but a sufficient measure of individual autonomy must survive to permit every householder to exercise control over unwanted mail. To make the householder the exclusive and final judge of what will cross his threshold undoubtedly has the effect of impeding the flow of ideas, information, and arguments that, ideally, he should receive and consider. Today's merchandising methods, the plethora of mass mailings subsidized by low postal rates, and the growth of the sale of large mailing lists as an industry in itself have changed the mailman from a carrier of primarily private communications, as he was in a more leisurely day, and have made him an adjunct of the mass mailer who sends unsolicited and often unwanted mail into every home. It places no strain on the doctrine of judicial notice to observe that whether measured by pieces or pounds, Everyman's mail today is made up overwhelmingly of material he did not seek from persons he does not know. And all too often it is matter he finds offensive.

* * *

"[T]he mailer's right to communicate is circumscribed only by an affirmative act of the addressee giving notice that he wishes no further mailings from that mailer.

"To hold less would tend to license a form of trespass and would make hardly more sense than to say that a radio or television viewer may not twist the dial to cut off an offensive or boring communication and thus bar its entering his home. Nothing in the Constitution compels us to listen to or view any unwanted communi-

cation, whatever its merit; we see no basis for according the printed word or pictures a different or more preferred status because they are sent by mail. The ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality, and none of the recognized exceptions includes any right to communicate offensively with another. see *Camara v Municipal Court*, 387 US 523 [87 S Ct 1727; 18 L Ed 2d 930] (1967)." *Rowan, supra*, 736-737.

Petitioner's right to privacy, "to be left alone", inherently includes the power to have some discretion in what enters his home through the mail. Congress recognized this in passing 39 USC 3008, thereby giving the addressee the authority to stop mailings to his home which he, "in his sole discretion believes to be erotically arousing or sexually provocative". The Supreme Court expanded this power, if only by dicta, to allow the addressee to strike his name from any mailing list. To require the Bar to honor petitioner's request to remove his name from the commercial mailing list would require the burden and added expense of keeping two mailing lists. Depending on how many attorneys opt for removal of their names the Bar may, or may not, be able to maintain the group rates it now provides for its members. Even though petitioner can easily identify the soliciting mailing by its clearly marked envelopes, thereby lessening the intrusion into his privacy, he has the right to demand that his name be excluded from mass merchandising mailing lists since the state cannot be said to be promoting the administration of justice or advancing the science of jurisprudence through this type of mailing.[39]

[39] We restrict our ruling to commercial mailings unrelated to the Bar's authorization to aid in the improvement of the administration of justice and to promote the advancement of jurisprudence. Thus insurance and travel advertisements may be restricted while mailings

V. CONCLUSION

Petitioner has failed to prove a case for relief in any of the specific categories set forth in his complaint and briefs except for item 11 relating to the sale of the use of the State Bar mailing roster. (But see fn 8.)

Therefore the State Bar shall, on petitioner's request, remove his name from the roster sold for commercial use. With respect to all other challenges petitioner's request for relief is denied.

No costs, a public question being involved.

COLEMAN, C.J., concurred with WILLIAMS, J.

LEVIN, J. The issues, facts and history of this proceeding are set forth in Justice RYAN'S and Justice WILLIAMS' opinions.

We have concluded that while the record is sufficiently developed to resolve some of the issues, it is insufficiently developed to resolve others, and therefore the cause should be remanded for a further hearing.

I

The record in this case is sufficiently developed to resolve the challenges to all bar activities save the activities of the Young Lawyers Section and of the Lawyers Wives beyond those directly educating members of the bar and the public about the law and the legal system, the Lawyer Placement Service, the commercial sale of the bar's mailing list, and activities addressed to influencing legislation. Activities addressed to influencing legislation include not only lobbying activities but also the

announcing continuing legal education programs, which plaintiff concedes are within the Bar's proper function, may not be so limited.

adoption of formal bar positions on proposed legislation and social functions in furtherance of legislative activities.

In ordinary litigation, a party's failure to develop an adequate record would, according to the appropriate allocation of the burden of proof, control the disposition of the case. This case is not, however, an ordinary litigation in which a party is limited to the relief to which he has proven himself entitled. Falk's petition calls for the discretionary exercise of this Court's extraordinary superintending control. We must consider, therefore, not merely the relative rights of the parties before us but, rather, the proper organization and actions of the bar in light of the rights of all its members and the interests of the state.

When this Court exercises its power of superintending control, the Court has the responsibility of ensuring that it is fully informed. To allow inadequacies in the record to shape the order affecting the rights of persons other than the parties would be to cede a measure of our discretion to the parties.[1] We conclude that a more complete factual record is needed to determine the appropriate

[1] Falk commenced this action as an orginal proceeding in this Court denominating it "Petition for Special Relief". No statute or court rule expressly authorizes such a petition. If the petition were an ordinary lawsuit claiming violations of Falk's constitutional rights, it should have been filed in a circuit court. If regarded as an action for a writ of mandamus against a state officer, it should have been commenced in the Court of Appeals, or the circuit court for Ingham County or other county in which venue was proper. MCL 600.4401; MSA 27A.4401. This Court has elected to treat Falk's petition as a request to exercise the Court's statutory power to regulate the conduct and activities of the bar. MCL 600.904; MSA 27A.904.

As such, this proceeding is more in the nature of a rule-making proceeding than a lawsuit; what character it has as a lawsuit is the result of this Court's action in appointing a judge to conduct a hearing and make findings of fact.

Since this is not a lawsuit, or even an action whose procedure is delineated by statute, court rule or precedent, it is inappropriate to limit our consideration of the issues presented in this proceeding according to the rules circumscribing lawsuits. To determine the

order as to the bar's legislative activities, the activities of the Young Lawyers Section and of the Lawyers Wives beyond those directly educating members of the bar about the law and the legal system, the Lawyer Placement Service, and the commercial sale of the bar's mailing list, and therefore remand for the purpose of developing such record.

II

The controlling decisions of the United States Supreme Court on the First Amendment issues in this case, *Hanson*,[2] *Street*,[3] *Lathrop*,[4] and particularly *Abood*,[5] are fully discussed in Justice RYAN's opinion.

Some may read *Abood* as concluding that any compelled association and support, whether for collective bargaining purposes or otherwise, so intrudes upon the First Amendment rights of individual members as to be permissible only for purposes germane to those activities of the unified organization which serve compelling state interests and which cannot be accomplished by means less intrusive upon the First Amendment rights of objecting members.[6]

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scope or content of an order regulating the bar according to burdens of proof or inadequate showings in the record we ordered would be to treat this proceeding as the lawsuit it clearly is not.

[2] *Railway Employes' Dep't v Hanson*, 351 US 225; 76 S Ct 714; 100 L Ed 1112 (1956).

[3] *International Ass'n of Machinists v Street*, 367 US 740; 81 S Ct 1784; 6 L Ed 2d 1141 (1961).

[4] *Lathrop v Donohue*, 367 US 820; 81 S Ct 1826; 6 L Ed 2d 1191 (1961).

[5] *Abood v Detroit Board of Education*, 431 US 209; 97 S Ct 1782; 52 L Ed 2d 261 (1977).

[6] The Court in *Abood* observed, as to the collection of dues to support collective-bargaining activities:

"To compel employees financially to support their collective-bar-

gaining representative has an impact upon their First Amendment interests. An employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative. His moral or religious views about the desirability of abortion may not square with the union's policy in negotiating a medical benefits plan. One individual might disagree with a union policy of negotiating limits on the right to strike, believing that to be the road to serfdom for the working class, while another might have economic or political objections to unionism itself. An employee might object to the union's wage policy because it violates guidelines designed to limit inflation, or might object to the union's seeking a clause in the collective-bargaining agreement proscribing racial discrimination. The examples could be multiplied. To be required to help finance the union as a collective-bargaining agent might well be thought, therefore, to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit. But the judgment clearly made in *Hanson* and *Street* is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." *Abood, supra*, p 222.

The Court further observed, as to dues collected for purposes other than collective bargaining:

"Our decisions establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments. * * * Equally clear is the proposition that a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment. * * * The appellants argue that they fall within the protection of these cases because they have been prohibited, not from actively associating, but rather from refusing to associate. They specifically argue that they may constitutionally prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative. We have concluded that this argument is a meritorious one.

"One of the principles underlying the Court's decision in *Buckley v Valeo*, 424 US 1 [96 S Ct 612; 46 L Ed 2d 659 (1976)], was that contributing to an organization for the purpose of spreading a political message is protected by the First Amendment. Because '[m]aking a contribution * * * enables like-minded persons to pool their resources in furtherance of common political goals,' *id.*, at 22, the Court reasoned that limitations upon the freedom to contribute 'implicate fundamental First Amendment interests,' *id.*, at 23.

"The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State. * * * And the freedom of belief is no incidental or secondary aspect of the First Amendment's protections:

" 'If there is any fixed star in our constitutional constellation, it is

Others may read *Abood* as providing that while the state interest served by required association and financial support must be a compelling interest, any activity germane to that interest, rather than only those least intrusive upon members' First Amendment rights, is permissible.[7]

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that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.' *West Virginia Bd of Ed v Barnette*, 319 US 624, 642 [63 S Ct 1178; 87 L Ed 1628 (1943)].

"These principles prohibit a State from compelling any individual to affirm his belief in God, * * * or to associate with a political party * * * as a condition of retaining public employment. They are no less applicable to the case at bar, and they thus prohibit the appellees from requiring any of the appellants to contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public school teacher." *Abood, supra*, pp 233-235.

[7] The Court in *Abood* stated:

"We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward *the advancement of other ideological causes not germane to its duties as collective-bargaining representative*. Rather, the Constitution requires only that such expenditures be financed from charges, dues or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment." *Abood, supra*, 235-236. (Emphasis supplied.)

Where the intrusive limitation on association *directly* affects the First Amendment right of expression (here political expression), as where a statute precludes voting in one party's primary within 23 months after voting in another party's primary, *Kusper v Pontikes*, 414 US 51, 58-59; 94 S Ct 303; 38 L Ed 2d 260 (1973), or where not belonging to a particular political party results in discharge from a government job, *Elrod v Burns*, 427 US 347, 363; 96 S Ct 2673; 49 L Ed 2d 547 (1976) (plurality), the Court has adopted the strict, "least intrusive means" test. For example, in concluding that the Illinois Election Code violated the First Amendment by prohibiting a person from voting in a primary election of a political party if that person had voted in another party's primary within the previous 23 months, Justice Stewart described when and how the least intrusive means test applies:

"[A] significant encroachment upon associational freedom cannot be justified upon a mere showing of a legitimate state interest. * * * For even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty. * * * If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties." *Kusper, supra*, pp 58-59.

Alternatively, still others may read *Abood* as applying different standards of judicial scrutiny according to the nature of the activity: dues collected to support collective-bargaining activities may be considered as assessments imposing the cost of obtaining an economic benefit on the beneficiaries, subject to the lower standard of scrutiny outlined in *Hanson* and *Street*,[8] while mandatory

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In contrast, where the intrusive limitation on association *indirectly* affects the First Amendment right of expression, as where employees, though free to express their own views without limitation, are required to pay dues to a union which may hold views different from the employees, *Abood, supra*, pp 225-226, the Supreme Court may have adopted the less restrictive "germane" test.

[8] While the Court in *Abood* recognized that compulsory support of collective bargaining activities had an "impact" on First Amendment "interest", and that such support "might well be thought * * * to interfere in some way with an employee's freedom to associate", *Abood, supra*, p 222, the opinion may be read by some as concluding that strict scrutiny was not appropriate to assess that interference. The Court relied on the analysis in *Hanson* and *Street*, saying "the judgment clearly made in *Hanson* and *Street* is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress". *Id.*

Both *Hanson* and *Street* dealt summarily with the First Amendment issues posed by mandatory dues, initiation fees and assessments for collective bargaining activities. Finding that the congressional provision for union shops was a permissible exercise of the power to regulate interstate commerce, the Court in both cases found that requiring " 'support of the collective-bargaining agency by all who receive the benefits of its work * * * does not violate either the First or the Fifth Amendments'". As expressed by Justice Douglas, the author of *Hanson*, concurring in *Street*:

"We * * * concluded in * * * *Hanson* * * * that it was permissible for the legislature to require all who gain from collective bargaining to contribute to its cost. That is the narrow and precise holding of the *Hanson* case * * *."

Collective bargaining is an effort primarily aimed at furthering the economic or commercial interests of a union's membership. The commercial nature of conduct claimed to be constitutionally protected has sometime led the Court to adopt a lower standard of protection than is accorded non-commercial activities. Similarly, compelled association and support in furtherance of commercial activities, as distinguished from ideological activities, might be considered by the United States Supreme Court to be less intrusive on First Amendment rights. See, *e.g., In re Primus*, 436 US 412, 437-438, and fn 32; 98 S Ct 1893; 56 L Ed 2d 417 (1978), distinguishing *Ohralik v Ohio State Bar Ass'n*,

dues collected for purposes other than promoting the economic self-interests of members are subject to the higher standard applied in *Abood* to activities not germane to the collective-bargaining process.

Application of the principles announced in *Abood* to the instant case is further hampered by the indefiniteness, on this record, of the purposes and state interests served by the bar. Section 1 of the State Bar Rules, promulgated by this Court pursuant to the Court's powers over the Bar and its members, states:

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436 US 447; 98 S Ct 1912; 56 L Ed 2d 444 (1978), and the solicitation of clients for expressive as opposed to commercial purposes:

"Normally the purpose or motive of the speaker is not central to First Amendment protection, but it does bear on the distinction between conduct that is 'an associational aspect of "expression"' * * * and other activity subject to plenary regulation by government. * * * As shown above, appellant's speech—as part of associational activity—was expression intended to advance 'beliefs and ideas.' In *Ohralik* * * *, the lawyer was not engaged in associational activity for the advancement of beliefs and ideas; his purpose was the advancement of his own commercial interests. The line, based in part on the motive of the speaker and the character of the expressive activity, will not always be easy to draw * * *, but that is no reason for avoiding the undertaking."

It should be noted, however, that the Court in *Abood* said that "[n]othing in the First Amendment or our cases discussing its meaning makes the question whether the adjective 'political' can properly be attached to those beliefs the critical constitutional inquiry". *Abood, supra*, p 232.

Assuming that the State Bar may, without contravening First Amendment rights, engage in activity designed to promote the economic interests of its members, it should be noted that any group similar in size and variety of membership to that of the bar may be expected to face difficult questions when allocating resources. Activities enhancing the economic opportunities of litigators may not similarly benefit corporate lawyers, for example. Indeed, activities such as lobbying for defeat of motor vehicle no-fault insurance legislation might work to further the interests of personal injury litigators at the expense of other types of litigators by committing limited judicial resources to motor vehicle tort actions, thereby increasing delays and other disincentives to the bringing of other types of actions. Such conflicts, and the requirement that members contribute to an association which may, therefore, undercut their self-interests, may not be adequately ameliorated by the democratic process within the bar.

"The state bar of Michigan shall, under these rules, aid in promoting improvements in the administration of justice and advancements in jurisprudence, in improving relations between the legal profession and the public, and in promoting the interests of the legal profession in this State."[9]

This broad statement of purpose is susceptible to both expansive and restrictive interpretations. On the one hand, the bar represents the collective experience of legal experts in many fields, and its views on legislation as substantive as revisions of the criminal code, changes to the divorce laws, and no-fault insurance may serve compelling state interests. On the other hand, the threatened and actual intrusions upon individual members' First Amendment rights occasioned by compelled support of substantive issues to which they are opposed may make it proper or even constitutionally necessary to limit this broad statement of purpose to the promotion of issues which are directly related to the the practice of law and administration of justice as defined in their narrowest senses, such as court reform, lawyers' education, and requirements for the practice of law, or to eliminate entirely bar legislative activities funded by compulsory dues.

The question is made more complex by the unique relationship between lawyers and the law. Laws are the tools of the lawyer's trade; to improve those tools generally requires legislative activity. Laws are the substance of the lawyer's business; changes in the law will often affect the economic interests of the profession. Further, both by training and daily experience, lawyers possess an expertise in the practical functioning of laws

[9] 340 Mich xxxviii (1954).

and the justice system which may make their views on legislation of unique value.

Yet it is clear that a line must be drawn. The lawyer's relation to the law could rationally support the bar's taking a stand on even the most basic of public policy issues.[19] At some point, the

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[19] Selections from the record illustrate the bar's tendency to blur the interests of attorneys *qua* attorneys with the general public interest. Unless noted, all questions were posed by counsel for the bar; all answers are those of the Executive Director of the bar.

As to the lobbying activity of the bar:

"Q. Mr. Franck, is it not fair to say that given the complexities of society today, given the increasing participation of governmental agencies in the life of our society, that for any group, let alone a formally organized group of lawyers, to function, that there must be constant contact with government at every level by that organization?

"A. Yes. And then of course it's particularly true, in my judgment, of the legal profession since its function and contribution to society is to deal with the law and the law, obviously, is the function of the three branches of government. So it is almost by definition that the profession can carry out those functions assigned to it by society only by involving itself in the governmental process which creates the law with which the profession deals.

"Q. Ergo the bar must lobby?

"A. Yes, sir."

As to the distinction between bar lobbyists and other lobbyists:

"Q. *(Mr. Falk)*: The question was: Doesn't a lobbyist for the UAW have an interest in labor. * * *

* * *

"A. I'm sure he does, but he is paid to produce a certain result and therein lies a tremendous distinction between any activity the State Bar has with members of the Legislature.

"Q. *(Mr. Falk)*: Doesn't the State Bar attempt to get legislation favorable to the legal profession as it views it?

"A. To the legal profession, but—and the judiciary, but more important to the public because our profession, as we all recognize, the bottom line is to better serve the public. That's what it's all about.

"Q. *[Mr. Falk]*: Is what constitutes service to the public judgmental or objective?

"A. Well, I suppose that what you think is service to the public may be different than what I think, but it is the collective judgment of the State Bar."

As to the political activities, in general, of the bar:

"Q. Why are those activities related to the life of the organized bar?

"A. Because the life of the profession is to work through law, whether that law is specific statute, court rule, municipal regulation,

and that is where the profession works; that is where its expertise and where its ability to contribute to the public's understanding and development and welfare lies. So those are the areas in which the profession works and the organization of the profession works in those areas as an organization."

As to the types of legislation of interest to the bar:

"A. [W]e are now increasingly both choosing to involve ourselves with non-lawyer organizations in the consideration of issues involving substantial elements of public policy and by contrast from the other side major representatives of non-lawyer organizations, consumer organizations, union organizations and organizations of that kind are seeking out the State Bar in the consideration of problems of major public concern and seeking development of appropriate solutions to those problems.

* * *

"Q. Are these issues germane to the life of the State Bar?

"A. Yes, sir. They involve facets of the administration of justice.

"Q. In your opinion, Mr. Franck, are they germane to the life of the profession of law in this state?

"A. Yes, sir.

"Q. Why?

"A. Because they all affect the contribution of the profession to the evolution and existence of the society in which we live and those unique aspects of societal problems that the law and profession of the law concern themselves with."

"A. * * * The entire public skepticism about institutions, about laws, about the obligations of government, has, as we all know, increased dramatically. That has had tremendous ramifications in terms of proposed legislation, areas that are now fair game for legislative intervention so that that has to be considered, for the courts' rule-making powers have increased tremendously and the bar is almost a unique institution, for example, in terms of legislative process, whereas almost every other organization which has a membership component is interested in a very limited number of bills each session. For example, namely only those that affect membership. Most legislation does not directly affect lawyers as members of the State Bar of Michigan, but it does affect lawyers and their clients and their lives, and therefore, compared to other organizations we have an interest in almost every bill that is introduced over in the Legislature.

"Q. Now, is that interest in behalf of the profession or is that interest on behalf of the public, in fulfillment of the profession's judiciary responsibilities or a combination of both?

"A. It is—

"Q. Characterize it.

"A. It is really a combination of both. The viewpoint of the lawyers on public questions is very much shaped, obviously, by whom they represent, but in that reflection is the views and the concerns and indeed the experience of their clientele and those persons in the public that they represent. And of course another thing that is unique

interests of the bar and the state in collective legislative activity by the bar must yield to the constitutional freedoms of the individual lawyer.

III

It is unnecessary at this time to determine the appropriate standard of judicial scrutiny or to definitively articulate the bar's purpose, since such of Falk's challenges to bar activities as can be resolved on this record are clearly permissible even under the strictest standard of review and the narrowest construction of the bar's purpose.

A

Few would argue, and Falk himself is not one of them, that maintaining high standards of competence and honesty in the legal profession does not serve a compelling state interest. The bar's regulatory and licensing activities narrowly drawn to that end can be justified even if they impinge on members' First Amendment rights. Included among these activities are: continuing legal education, the Michigan Bar Journal to the extent it serves an informational function, advisory opinions on ethical questions, and disciplinary proceedings.

Whatever may be the proper use by the Court of members of the bar to improve the administration of justice, it includes, at the very least, activities primarily to educate the public about the law and legal services, to provide legal services to the indigent, to help the public to select legal counsel

about the profession is that there are lawyers on every issue who reflect every shade of opinion, every portion of the public that would be affected by proposed legislation, indeed has an interest or viewpoint on proposed legislation."

through the Lawyer Referral Service, and to provide forums for discussion of problems facing the courts and the legal profession.

That the state has a compelling interest in improving the administration of justice through activities such as these needs no explication. Compulsory dues are a necessary means both to provide adequate funds and to equitably share the burden among those subject to the duty. Limiting the compulsory element to a reasonable level of dues is the least intrusive means available. No actual participation by Falk is required beyond the financial obligation. This Court and the majority of the profession may rely on the volunteering of time and energy by members of the bar and other groups; without, at a minimum, the financial support to meet the expenses of these activities, they might end or be severely restricted.

Some of the non-legislative bar activities challenged by Falk fall comfortably within the permissible range of this category of activities. Without attempting to be exhaustive, activities such as the preparation and distribution by the Young Lawyers of the Juror's Manual, the distribution to junior high school students of the "You and the Law" booklet by the Lawyers Wives of Michigan, and funding of the Children's Charter, which provides a forum for discussing problems of juvenile delinquency requiring participation of third parties, are examples of clearly permissible activities.

B

Other activities of the bar challenged by Falk, including activities of the Young Lawyers Section and Lawyers Wives other than those described above, the Lawyer Placement Service, the commer-

cial sale of the bar's mailing list, and particularly bar activities addressed to influencing legislation, require development of a fuller and more particularized record before their permissibility can be determined.

On remand, the burden will be on Falk to show specific activities which allegedly infringe upon his First Amendment rights. The burden will be on the State Bar to establish the requisite state interest, the appropriate connection between particular activities and the state interest (or, if a valid criterion for First Amendment purposes, the economic self-interest of the bar's members), and the unavailability or impracticability of alternative means of realizing the asserted state interest. Particular attention should be given to specific evidence of what the bar is doing; how it came to be doing it; how and under what standards it chooses issues on which to take an official stand and which stand to take; whether any ground rules exist for declining to take an official position, with details of instances when the bar has so declined; whether any procedure exists for encouraging, receiving and presenting dissenting opinions; what alternatives are possible to accommodate the First Amendment rights of dissenting members; what impact alternatives will have on the effectiveness of the bar's assistance to its members, the public and this Court; and the proposed times and procedures for implementing alternatives.

We emphasize that the Court is not now deciding, nor intimating an opinion on, either the appropriate standard of judicial scrutiny or a definition of the state interests served by the bar. These issues have been discussed to indicate the kind of record which should be developed on remand and

to provide focus for briefing and argument after remand.

After remand, the Court will also consider, and the parties should address, whether a fair analysis of the purposes served by those bar activities presenting close questions of constitutional conflict and of alternatives thereto indicate that a better course would be to exercise the superintending authority of this Court by court rule to limit the activities of the bar to a greater degree than is absolutely compelled by the Constitution, and thereby eliminate the potential for constitutional conflict. Such an approach may not only serve the important goal of avoiding unnecessary decision of constitutional questions, but may also provide a desirable measure of flexibility in an area that will almost certainly change with time. Further, a proper respect for the "breathing room" necessary for full enjoyment of First Amendment rights suggests that this Court should be reluctant to allow bar activities to press upon the border of constitutional prohibition, absent a clearly demonstrated need therefor.

An appropriate order will enter. No costs, a public question.

KAVANAGH, J., concurred with LEVIN, J.

ORDERS ON REHEARING

State of Michigan
In the Supreme Court

ALLAN FALK,
Plaintiff,

-v- No. 60722

STATE BAR OF MICHIGAN,
a public body corporate,
Defendant.
_____/

Rehearing No. 105

In this cause a motion for rehearing is considered and, on order of the Court, it is hereby DENIED. *I, Corbin R. Davis, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order. IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing this 6th day of March in the year of our Lord one thousand nine hundred and eighty-four.*

/s/ Corbin R. Davis, Clerk

Rehearing No. 39

In this cause a motion for rehearing is considered and, on order of the Court, is hereby DENIED without prejudice to plaintiff's presenting the issues raised in further proceedings in this pending cause. *I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in*

said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order. IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing this 8th day of September in the year of our Lord one thousand nine hundred and eighty-one.

/s/ Corbin R. Davis, Deputy Clerk

JUDGMENT OF THE MICHIGAN SUPREME COURT

State of Michigan
In the Supreme Court

ALLAN FALK,
Plaintiff,

-v- No. 60722

STATE BAR OF MICHIGAN,
a public body corporate,
Defendant.
/

This cause having been brought to this court by petition for superintending control and having been argued by counsel and due deliberation had thereon by the Court, IT IS HEREBY ORDERED that the petition is DISMISSED.

I, CORBIN R. DAVIS, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order. IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing this 6th day of March in the year of our Lord one thousand nine hundred and eighty-four.

/s/ Corbin R. Davis, Clerk

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

State of Michigan
In the Supreme Court

No. 60722

ALLAN FALK,

Appellee,

v.

STATE BAR OF MICHIGAN,

Appellant.

(Filed May 24, 1984)

Pursuant to United States Supreme Court Rule 10, notice is hereby given that Allan Falk appeals to the Supreme Court of the United States from the final judgment entered by the Supreme Court of Michigan, dismissing Allan Falk's Complaint for Superintending Control entered in this cause on March 6, 1984.

This appeal is taken pursuant to the provisions of 28 USC § 1257(2).

Respectfully submitted,

/s/ ALLAN FALK
Attorney for Appellee
2001 N. Fairview
Lansing, Michigan 48912
(517) 373-7388
In propria persona

WITNESS BY WITNESS SUMMARY

1. David Jordan, Commissioner
   Michigan Court of Appeals

A former Deputy Insurance Commissioner, Mr. Jordan testified that the Client Security Fund could be replaced by standard forms of fiduciary bonding, and that the commercial alternative is both practical and an improvement in many respects over the existing system, without contravening the rights of those not in private practice.

Jordan also testified that, personally, he opposes philosophically the State Bar's lobbying activities.

2. William S. Ballenger, Director
   Department of Licensing & Regulation

A former State legislator and Assistant Secretary of HEW, Ballenger, from his perspective as head, for five years, of the Michigan agency regulating 44 licensed occupations, testified about the history of the concept of "professionalism", equating it with guildism and monopolization. He noted the poor track record of professional regulatory boards generally, and felt that, in terms of public respect and opinion, lawyers are at least as bad if not worse than other licensed occupations. He summarized comments he had heard around the State by describing the bar as a "very cozy, insidious private guild." The manner in which the bar enjoys self-regulation is "probably a far more controlled and controllable" system "than any system I've seen in any of the other professions, particularly those housed in the Department of Licensing and Regulation." He suggested that, for starters, the Governor, rather than the Supreme Court, appoint members of the various legal regulatory boards and

commissions, without being restricted to a list of nominees submitted by any part of the bar or the judiciary.

Ballenger noted that one characteristic of a licensed profession that distinguishes it from other occupations is its ability to engage in effective political lobbying, since professional recognition begins with a statutory monopoly.

3. James L. Shonkwiler, Executive Secretary
Prosecuting Attorneys Coordinating Council and
Prosecuting Attorneys Ass'n of Michigan

Testifying in his capacity as head of PAAM, Shonkwiler indicated that prosecutors generally do not feel that the State Bar serves their interests, and hence the public interest in many respects. No prosecutor has ever served on the Board of Commissioners. Shonkwiler felt that the Board of Commissioners operates in a generally high handed manner, in contrast to the PAAM, which confines its public espousal of a position to those cases in which there are no significant differences of opinion among its members. The PAAM, unlike the State Bar, also goes to some pains to solicit the views of its members, polling them when practicable. To the extent compulsory dues fund the State Bar's lobbying activities, the PAAM finds it more difficult to propagate its contrary views, even though all its members are also members of the State Bar.

4. Martha Seaman, Legal Draftsperson
Legislative Service Bureau

Ms. Seaman described the work of the LSB, its ability to provide the legislature with draft legislation based on legal and factual research without propagandizing the views of an interested or biased party. From a technical standpoint,

Seaman felt the LSB offers the best possible assistance to the legislature (N.B. Judge Lincoln and, later, Patrick Keating, indicated that in some situations only experienced practitioners have the requisite technical expertise to appreciate how theory can be translated into practice).

5. F. Martin Tieber, Director, Lansing SADO
Chairman, Defender Systems & Services Committee

Tieber's committee spent two years doing a fee study of trial and appellate appointed criminal defensive work, along with a smattering of attention to minor court rule revisions and legislation. The committee concluded that the fee system for private sector appointed criminal defense attorneys is intolerably low. He particularly criticized the flat fee system, e.g. Wayne County (by local court rule, WCCR 14.13 (k), the fee for an appeal is $250 for claim of appeal and brief; $50 for each 1/2 day in circuit court; $100 for the transcript plus $100 for each 400 pages after the first 400, motion fee of $50, and $50 for a jail visit.). Tieber admitted that half of all appeals are from guilty pleas, and that two-thirds of the members of his committee would increase their incomes if fees were raised. Tieber noted that two voluntary groups, the Lawyers Guild and the Defenders Association of Michigan, could equally well have performed this study, but neither has the political clout of the State Bar, and thus the chance for legislative amelioration of inadequate fees is better when the impetus comes from the State Bar.

6. Carol Ann Wilson, President
Lansing Chapter National Lawyers Guild

The Lawyers Guild, a voluntary organization dedicated to improvements in the administration of justice, consists

mainly of lawyers, with some students and paralegals. Devoted mainly to human rights, constitutional and political issues, the group has been active in farm labor litigation, prisoner litigation, anti-KKK work, sex and race discrimination programs, and has lobbied the legislature and the public on matters of concern, e.g. Proposal E (tax increase for new prisons). It instituted a prison lockdown relief suit, a suit against the Department of Corrections that resulted in expanded programs for women prisoners, another suit against the Department of Corrections challenging the department's drug offender classification system *vis a vis* prison placement programs, and has provided legal assistance to Iranian students facing immigration difficulties and to victims of domestic abuse. The Guild has also pressured the Lansing Police Department to enforce certain domestic abuse laws, and has conducted conferences and workshops to educate the public about these problems.

7. John Braden, Private practitioner; Secretary Mecosta-Osceola Bar Association

Braden, a member of the Board of Directors of Legal Aid of Western Michigan, took umbrage at State Bar lobbying efforts designed to induce Congress to continue funding of the Legal Services Corporation, personally believing, as does President Reagan, that voluntary funding for indigent legal services is both preferable and possible. On his motion, the Mecosta-Osceola Bar Association unanimously passed a resolution opposing the insertion of the State Bar of Michigan into this political controversy.

Braden personally opposes State Bar lobbying generally, and on specific issues — he favors abolition of the "American Rule" on awarding attorney fees, and supports an elected judiciary, both in contrast to positions of the State Bar. He noted that use of his compelled dues in support of

lobbying by the bar makes it more difficult and expensive for him to petition the government for a redress of his grievances, both by reducing the funds available to him for the purpose, and by making his task more onerous by raising the level of opposition he must overcome.

8. Linda Coleman Shirkey, Director, DSS Office of Legal Affairs
Co-Chairperson, Committee on Mentally Disabled

This committee has been involved in a variety of long term projects:

(1) Drafting guidelines for defense counsel in civil commitment proceedings;

(2) Basic skills seminar for young lawyers in civil commitment cases;

(3) Televising live testimony of psychiatrists in Oakland County Probate Court commitment cases, in conjunction with Department of Mental Health;

(4) Studying the efficacy of the Mental Health Code.

Due to the cross-sectional expertise of the committee, it acts as counsel to the legislature on legislation proposed by others.

Coleman Shirkey acknowledged that the same job could be performed by a voluntary bar association, but doubted it could be done as effectively (on theory a voluntary bar would not be able to draw on as wide a cross-section of talent). She recognized that when the State Bar publicly advocates a position it is trading on the collective reputation of all lawyers, including those who disagree with that position.

9. Michael Golum, Private practitioner; Chairman Civil Liberties Committee

This committee does essentially the same thing as the American Civil Liberties Union, but works within the confines of the State Bar, trying to sway the bar to a more civil libertarian position. One activity of which Golum was particularly proud was overturning a judicial order to a hospital emergency room physician to take a blood sample pursuant to a search warrant, though he acknowledged that under *United States v. New York Tel Co*, 434 U.S. 159, 174; 98 S Ct 364; 54 L Ed 2d 376 (1977) the order might well have been valid, and the efforts of the committee may have frustrated the due administration of justice.

Golum opined that most of the members of his committee, if the bar became a voluntary organization, would join the bar and work to establish a civil liberties committee therein.

10. Robert D. Kaplow, Private practitioner Member, Grievance Committee

Kaplow's committee is concerned with the general operation of the grievance process. The committee proposed a Peer Review System to the Board of Commissioners, which the Board rejected, even though it would improve the competence of lawyers and was supported by the Grievance Commission and Attorney Discipline Board. Kaplow acknowledged that no part of the disciplinary machinery functions as a detective to ferret out incompetent or dishonest lawyers; instead, the system acts on complaints that are brought to it.

11. Michael V. Marston, Private practitioner
Chairman, Military Law Committee

The Military Law Committee drafted the Michigan Code of Military Justice and pushed it through the legislature, MCL 32.1001 *et seq*. Marston admitted that this code is essentially identical to the Uniform Code of Military Justice enacted by Congress in 1951, 10 USC §§ 801 *et seq*., and that there has been no court-martial under Michigan law since World War II, so that the necessity for changes in the law is purely theoretical.

12. Dennis C. Kolenda, Member
Special Committee on Revision of the Criminal Code

Over several years that task force drafted a completely revised criminal code, which the State Bar has for some time tried unsuccessfully to push through the legislature. Two years of attorney days were consumed in meetings alone. On cross examination, delving into particular applications of the proposed code, it was established that those portions representing changes in existing law may well be detrimental to the public interest.

13. R. Stuart Hoffius, Judge, Kent County Circuit Court
Chairman, Law & Media Committee

This committee exists to foster a liaison between the bar and the media, in part in hopes of improving the image of the bar published or broadcast in the various media. The committee has discussed the use of television and electronic devices in the courtroom, worked to develop guidelines for reportage of major trials, and addressed the problem of search and seizure of media facilities. Judge Hoffius identified the committee's current interests as regulation of the

bench and bar *vis a vis* the media while preserving intact the public's interest in a free press and fair trial. The committee gets cooperation from the Michigan Broadcasters' Association and Michigan Press Association, voluntary groups, and has induced the State Bar to sponsor media awards.

14. John Robert Dethmers, Private practitioner
Chairman, Committee on State Trial Courts Administration

Since 1959 this committee has worked to revamp the structure of the Michigan trial court system, and was instrumental in the creation of the Court of Appeals also. By the time the State Bar was prepared to address the issue of lower court reorganization, the Governor was in the process of appointing a commission to propose legislation on the subject, and several bills were already in the legislative hopper. The Supreme Court then collaborated and a joint legislative committee was established, in which the State Bar played an important role. Despite the existence of the Committee, the Supreme Court created its own Committee on Local Court Rules. While claiming that his personal motives these past 12 years were solely to improve the administration of justice, create new jobs and opportunities for lawyers, Dethmers joins other organizations and contributes his energies to them, on the basis of his interest in their work and their dedication to public service.

15. William G. Reamon, Private Practitioner; Past State Bar President
Co-Chairman, Judicial Qualifications Committee

This committee, formed at the instigation of the Governor, evaluates persons being considered for appointment to judicial office on the basis of professional, rather than polit-

ical, qualifications. Unfortunately, 90-95% of the public is unaware of the existence of the committee, and thus sources of information on candidates are severely limited. The fact that all committee members have been active in bar affairs over the years gives the impression to candidates that bar activity may be beneficial to their rating by the committee, and the committee may have a "mind set" that favors bar activists. Reamon acknowledged that a voluntary bar association could perform the same functions equally well, exemplified by the American Bar Association's similar committee for the federal courts.

16. Lynda Krupp, Staff Lawyer
Wayne County Neighborhood Legal Services
Chairperson, Consumer Law Committee

A charter of the committee is "protection of the interests of the public at large with respect to the consumer laws of the State of Michigan." In the past three years, the major accomplishment has been publication of the pamphlet "How to Get What You Paid For" (Exhibit 12). While voluntary organizations dedicated to the same goals exist in Michigan, none apparently has the funding or interest to have undertaken this task (N.B. Equivalent pamphlets are published by every voluntary bar association on which there is evidence in the record.). If the bar were voluntary, Krupp would join and agitate for the creation of a consumer affairs committee.

17. Joel M. Boyden, Private practitioner, Chairman
Lawyers and Judges Assistance Committee

Aware of the problem of lawyers and judges incapacitated by virtue of physical, emotional or addictive disabilities, and of the ineffective response to the problem by the existing

disciplinary machinery, the Committee was created to develop an alternative method for both removing such people from positions of responsibility and rehabilitating them where possible so they can be returned to the professional fold. Working with the Michigan Medical Society, a plan was formulated which became GCR 970. The committee's task was simplified by virtue of the fact that governmental and private organizations had already studied alcoholism in the professions, and other voluntary professional groups have adopted similar programs.

The committee has also devised a Young Lawyer Assistance program, oriented towards making available to young lawyers knowledgeable older practitioners to help them avoid mistakes as they branch out into new areas of the law and of legal practice. This program works exclusively through the local, voluntary bar associations.

Plaintiff disavowed any objection to the work of this committee.

18. Quinn Earl Benson, Private practitioner; Chairman Arbitration & Alternate Methods of Dispute Resolution Committee

In addition to inducing the Supreme Court to expand the mediation principle from Wayne County to the entire State, GCR 316, the Committee has worked on the idea of neighborhood dispute resolution centers, to handle such common neighborhood problems as barking dogs, loud stereos, etc. The witness was aware of only one working program anywhere, that sponsored by the Chicago Bar Association on the North Side of the Windy City; the October, 1981 Michigan Bar Journal reported that, in fact, 140 neighborhood dispute resolution centers existed nationwide.

19. Sandor Gelman, Private practitioner, Chairman
Advertising, Certification & Specialization Committee

This committee has proposed a self-designation specialization plan and advertising guidelines, both of which were rejected by the Supreme Court. The witness was unaware of the long history of specialization, and accompanying organization and experience, in the medical profession (Exhibit 20).

20. Arthur Tarnow, Private practitioner; Former head of SADO; Chairman
Committee on Standard Criminal Jury Instructions

Unlike the SJI, the SCJI have not been adopted by the Supreme Court; instead, they are addressed individually as issues arise. Tarnow acknowledges that the SCJI could have been composed by another group, although they were not in practice; in particular, judges were reluctant to undertake the job, since they must ultimately rule on the finished product and are averse to in effect rendering advisory opinions. Other States, including Illinois, which has a voluntary bar association, have likewise promulgated SCJI's.

21. Eugene Mossner, Private practitioner, Chairman
Lawyers Professional Liability Insurance Committee

In response to escalating malpractice insurance premiums, the committee was formed in 1977, charged with studying and formulating recommendations pertaining to the availability and quality of professional liability insurance for Michigan lawyers. At the time, there was some concern lawyers would "go bare" rather than pay the premiums being charged. Through discussion with the American Home Insurance Company, the committee achieved rate

reductions beginning in 1980. Mossner's own firm of 13 lawyers saved $6200 in that year. Mossner noted that malpractice insurance is mandatory in Oregon, and that, if commercial carriers had proved uncooperative, the State Bar could have formed its own insurance company. The witness acknowledged that the work of the committee is as much self interest as public interest.

22. Dennis Archer, Private practitioner, Chairman Committee on Delivery of Legal Services

This committee has been concerned with why people do or do not retain lawyers to resolve their problems, and with publicizing the existence of free legal aid. Based on an ABA study indicating that a large number of people have unmet legal needs, the committee hoped to satisfy those needs through prepaid legal services plans, and to generate more *pro bono* contributions to pick up the slack left by the Reagan budget cuts. Prepaid legal services work with the United Auto Workers generated $18.5 million in lawyers fees. Among other States with prepaid legal service plans in operation are New York, Illinois, Pennsylvania, and approximately 26 others, as well as New Orleans, those named being voluntary bar associations.

23. Jeanette Paskin, Private practitioner, Chairman Appellate Court Administration Committee

This committee was the brainchild of T. John Lesinski, former Chief Judge of the Michigan Court of Appeals. Its major projects have been revising the appellate court rules (N.B. a complete revision of GCR 800-849 was prepared by the staff of the Michigan Court of Appeals *sua sponte*, and was introduced into the record) and formulating recommendations concerning the representation of indigents on

appeal. The committee has also discussed the problems caused by unpublished opinions and delays.

24. Frances Ryan, President
Lawyers Wives of Michigan

Lawyers Wives has 1600 members, who devote their collective efforts to public relations on behalf of lawyers and the legal profession and to education in the schools. The group has sponsored two non-law related art exhibits in the State Law Library, published a brochure on careers in the law, conducted an essay contest in the high schools, and concentrates on Law Day activities mostly in the schools. Additionally, the group acts as a conduit for new legislation, which it forwards, without comment or analysis, to school administrators. As Law Day is a substitute for International Labor Day ("Red May Day"), it may have political overtones. Many of the projects of Lawyers Wives are supported by funds raised locally; Mrs. Ryan personally belongs to "hundreds" of organizations to which she voluntarily pays dues.

25. Robert Wilson, Private practitioner, Chairman
Committee on Arbitration of Disputes Among Attorneys

The purpose of this committee is to avoid "airing dirty linen in public"; it deals with disputes emanating from partnership dissolution and fee splitting. Originally the disputants paid only a portion of the costs, and the State Bar underwrote the rest from compulsory dues. Recently the committee has begun to charge the parties actual costs (except the meal allocation for committee members and building costs borne by the State Bar), which has not deterred anyone from availing himself of this service. (N.B.

Massachusetts offers an identical service within the context of a voluntary bar association).

YOUNG LAWYERS SECTION

26. Donald Gasiorek, Chairman
Moot Court Section

This section annually sponsors the State level of the national moot court competition, which is conducted under the auspices of the Bar of the City of New York and the American College of Trial Lawyers, both voluntary organizations.

27. James Colbert, Chairman
Basic Skills Committee

Under the joint sponsorship of ICLE, the BSC operates an educational program directed to young lawyers, which is the most highly attended of all ICLE programs. Registrants' fees cover all costs of the program (again, other than meal and building functions for committee members).

28. Michael Harrison, Judge, Ingham County Circuit Court
Past Chairman, YLS

During Judge Harrison's tenure as president, the YLS concentrated on three areas: (1) public interest; (2) bar interest; and (3) law student interest. He described some of the many activities undertaken, and opined that no other group could have accomplished so much. However, he equivocated when asked whether a YLS within the context of a voluntary bar association might have duplicated these results, and admitted that YLS's in other States are involved

in many of the same activities. He conceded that it would be fair to say that, if one educates lawyers to the beneficial aspects of bar membership, they will become active volunteers (N.B. The same sentiments were reiterated by James Bierbower, President of the District of Columbia Bar).

29. John Minock, Chairman, Child Advocacy Committee
Chairman, State Bar Juvenile Law Committee

Minock's State Bar committee has no programmatic functions; it reviews legislation dealing with juvenile law, and consults with the House of Representatives, Legislative Service Bureau, etc. Picking up a thread from Judge Lincoln's comments during the testimony of Martha Seaman of the LSB, Minock observed that practitioners in a particular field have certain kinds of expertise that cannot be readily acquired through ordinary research, particularly as LSB staffers lack the time to "immerse" themselves in anything so complex as revision of the Juvenile Code. Minock flatly stated he would not consider his committee a success until it achieves enactment of a revised juvenile code.

The YLS Child Advocacy Committee is basically an educational project oriented towards attorneys who represent children in abuse and neglect cases, funded by YLS funds matched by an ABA grant. Seventy-five percent of the seminar "faculty" were non-legal personnel — psychologists, etc.

Recognizing Judge Lincoln as the nation's number one expert on juvenile law, Minock, when informed that Judge Lincoln had personally drafted and lobbied through to passage the current code, offered no explanation how his committee could improve on that. He acknowledged that numerous other groups, both of lawyers and judges, con-

tribute information and analysis to the legislature on a wide assortment of topics; in particular, the ABA has generated 20 volumes of standards on juvenile justice.

If the State Bar were a voluntary organization, Minock would join and work to create an active juvenile law committee.

30. Mary Kay Scullion, Chairperson
Paralegal Project SPSM (non-lawyer)

The project, so named in 1978 when begun, became the Prison Reform and Rehabilitation Committee and now has been separately constituted as the Prison Legal Services of Michigan, Inc. This corporation provides free legal counsel to Michigan prisoners in civil matters: social security, divorce, child custody and *habeas corpus*. Funding is provided by the YLS, Michigan legislature, MTLA, LEAA and ABA. The project lawyers plan to institute litigation to force the legislature to continue funding at present levels.

31. Fred Baker, Jr., Chairman
Provision of Legal Services to the Elderly

The YLS provided seed money for a legal clinic for the elderly in Ingham County, where, according to rumor, a previous attempt had failed. Some funding has come from Thomas M. Cooley Law School, as well as through the Older Americans Act of 1965 (PL 92-258), as amended (42 USC §§ 3001 *et seq.* and portions of titles 20 and 29). Although contending the project would have been impossible without the backing of the State Bar, Baker eventually conceded a voluntary bar could have accomplished the same thing (N.B. ABA reports over 40 such programs sponsored by local and State bar associations).

32. Michael Legg, Chairman
Law Firm Visitation Day

Legg's committee arranges for law students to visit Detroit metropolitan law offices to gain some insight into the realities of private practice.

33. John McSorley, Chairman
YLS

Describing the YLS as "the conscience of the State Bar" (a title claimed also by the Civil Liberties Committee), McSorley testified that the YLS seeks to identify needs not served by the State Bar itself and then to fulfill them. Under McSorley's tutelage and that of his predecessors, the YLS has won several awards from the ABA (N.B. Both the Massachusetts and D.C. YLS's, among others, have won such awards). McSorley spoke of several YLS programs, including a series of video tapes (Exhibit 18) "Law in Your Life", SCOPE (Senior Counselor Offering Professional Experience) (N.B. Reference Joel Boyden's Young Lawyers Assistance Program), and the section newsletter "Inter Alia". McSorley admitted that YLS's exist in most other states, including those with voluntary bar associations, as well as in some major metropolitan bar associations.

34. Lawrence Nolan, Chairman
Prepaid Legal Services Committee
Travel and Tours Committee
United States Supreme Court Admissions Trip

As wearer of three hats, Nolan testified that the Supreme Court trip costs the section about $500 per year, and is strictly a service to interested members in the bar.

The Travel and Tours Committee actually returns a profit

to the section, and hence plaintiff, so long as this continues, disclaims any objection to its work.

Prepaid Legal Services represents a significant profit making opportunity for lawyers in private practice, which is what motivated Nolan to take an interest, as he feared he might lose a portion of his blue collar clientele to the UAW prepaid legal plan.

Nolan noted that at least one voluntary bar association, the New York BA, also has a Supreme Court trip, as do other associations.

35. Larry Powe, Chairman
Publications Committee

Powe introduced Exhibits 25-31, publications of the YLS on various topics (N.B. These, and other pamphlets, were duplicated in kind and quality by those published and disseminated by other bar associations, both State and local, as shown by other exhibits).

Powe was also Chairman of the Alternatives within the Law Committee, which was geared toward law students. That committee's functions have not been preempted by the law schools themselves.

Previously, Powe chaired the now defunct Credit Union Committee, which after investigating the subject concluded it lacked sufficient attractions.

36. Henry Clay III, Chairman
Annual Meeting Committee

Clay introduced Exhibit 32, a summary of YLS annual

meeting activities, which ordinarily consists of a single seminar, e.g., in 1980 the topic was "Automatic Data Processing and the Law", in 1981, "Grievances and How to Avoid Them".

37. Daniel Stepek, Past Chairman
YLS

Stepek described the YLS Labor Arbitration Qualification Program, which trained lawyers to become labor arbitrators.

38. Marc Shaye, Past Chairman
YLS

Shaye introduced Exhibit 33, two applications for ABA awards and letters of critique on YLS projects.

YLS related evidence concluded with introduction of Exhibit 37, an affidavit describing the many awards won by the Michigan YLS, which noted the existence of some 220 other YLS's.

End Young Lawyers Section

39. Francis J. Coomes, President
Public Affairs Associates (non-lawyer)

Mr. Coomes, based on impressive credentials establishing his expertise in the legislative process, is the President and founder of the organization which is the paid lobbyist for the State Bar — $43,000 annually. Coomes on direct examination opined that the State Bar is unique in its dedication to the public interest, although on cross examination he admitted he really did not understand the substance of any of the legislation on which he had lobbied, and acknowledged that his other clients, who include professional associations (e.g. CPAs), similarly couch their legislative proposals in terms of the public interest. Coomes denied any knowledge as to how the administration of justice is affected by the various bills on which the bar takes an active interest.

Coomes described some of the major "accomplishments" of the State Bar lobbying effort, including the court reorganization package (as to which the Supreme Court provided the main impetus, the State Bar merely assisting) (Coomes denied the qualifications to comment on the effect of this legislation, which promoted such people as Traffic Referree William Hague in rank and status), the medical malpractice package (shown by later exhibits, particularly #94, to have had little practical effect), defeat of a bill which would have put the Attorney Grievance Commission in the Department of Licensing and Regulation (and thus have accomplished some of the reforms recommended by Mr. Ballenger), and defeat of a bill which would have made improvements in the judicial selection process (not because the bill was in any way bad, but because, by improving the process, it would make more difficult the bar's long term effort to eliminate the election of judges — a "whole loaf or none at all" approach).

40. Leo Farhat, Past President
State Bar of Michigan
Chairman, Committee on Scope and Correlation

This committee establishes the legislative program goals for the State Bar, and has established the criteria which guide the bar in its lobbying program. Although contending that the compulsory bar, by virtue of its all inclusive nature, is less motivated by self interest than voluntary bars, Farhat admitted that the ABA is no more characterized by self interest than the State Bar.

41. Peter Alter, Private practitioner, Chairman
Constitutional Law Committee

The committee's main focus has been the aftermath of Proposal K, the bail reform initiative. The committee recommended amendments to GCR 790 in consequence.

42. Julius Hanslovsky, Private practitioner, Chairman
Insurance Law Committee

A member of numerous voluntary lawyer associations, and active as such, Hanslovsky described his committee as consisting of practitioners dealing with insurance law and interested in developments therein.

43. Carl Smith, Jr., Private practitioner, Past President
State Bar Local Bar Liaison Administrator for the State Bar

Although he has since resigned his position, Smith worked with local bar groups to help them appreciate State Bar programs and to encourage them to participate and to develop programs of their own. He developed several media

spots containing both informational and "hire a lawyer" messages.

44. Leonard Esquina, Legislative Ombudsman, Chairman
Prisons and Corrections Committee

His committee's concern is with the rights of prisoners in the Michigan correctional system; their successes have been twice inducing the Supreme Court to declare unconstitutional legislation proscribing the possession of weapons by prisoners.

45. Donald Reisig, Private practitioner
Treasurer, State Bar
Chairman, Fiscal Committee
Chairman, Legislative Committee

Reisig discussed the budget process and how the Board of Commissioners approaches issues of legislation.

46. William Ralls, Private practitioner, Chairman
Oil and Gas Committee

This committee is dedicated to preservation of Michigan's natural resources and reasonable regulation thereof. All members of the committee are private practitioners whose clients favor production; cross-sectionally, they represent landowners, wildcatters, drillers, producers, pipelines, etc., but none represent environmental interests.

47. William Weiner, Professor of Law, Member
Criminal Jurisprudence Committee

This committee tracks developments in the criminal law.

48. Michael Perry, Private practitioner
Member, Medical-Legal Committee

The committee is devoted mainly to jawboning as a way of resolving continuing friction between the medical and legal professions. Perry acknowledged that the physician members of the committee represent voluntary organizations.

49. Otto Stockmeyer, Jr., Professor of Law
Member, Judicial Selection Committee

This committee is devoted to amending the Michigan constitution to eliminate the election of appellate judges and institute "merit selection" by the Governor — from a list of candidates to be compiled and submitted to the Executive by the bar.

50. John Krsul, President Elect, State Bar
Chairman, Committee on Committees

A major interest of the committee is institutional advertising — advertising to enhance the image of the profession, in part a reaction to private lawyer advertising considered by the committee to be unseemly. Other State bar associations pioneered in this field; two surveys revealed that more than 50% of the lawyers in Michigan oppose institutional advertising, and the Board of Commissioners eventually acceded to this majority sentiment.

The committee has studied empirically the volume of *pro bono* work done in Michigan with an eye to recommending whether it should remain voluntary or become mandatory. Also, the committee sponsors seminars aimed at advising the public of its legal rights, and prepared a kit to assist local

bar groups to set up their own seminars.

The Committee has been active in making Law Day "no bills day", establishing "Ask the Lawyer" programs, and publishing related brochures.

One pamphlet is designed to help new lawyers create a financially viable practice. The committee also does a great deal of public relations work on behalf of the profession, sponsoring media awards, issuing press releases on actions by the Representative Assembly, sending letters to newspapers when articles critical of attorneys appear, and mailing news items to 3500 "opinion leaders".

51. Charles Rutherford, Private practitioner
Chairman, Client Security Fund

Established in 1967, the CSF is allocated 5% of annual dues. As of May 15, 1981, the CSF had paid 145 claims totalling $600,000, and had a balance of $300,000. No claims are paid unless there has been an adjudication of professional misconduct by the grievance authorities (except *post mortem*). Lawyers suspended for more than 120 days must reimburse the CSF as a prerequisite to restoration of their license to practice law, GCR 972.2(9).

Exhibit 44 is the "Rules of Procedure of the Client Security Fund". Reimbursements are limited to $15,000. Victims of peculations by house counsel are excluded from the protection offered by the fund. Money or property lost as a result of tortious conversion by an attorney cannot be restored unless it is proved there was an intent to defraud at the time the money or property was first received. No losses arising outside the scope of a specific attorney-client or fiduciary relationship are covered. Losses caused by the acts

of an attorney who has been disbarred or suspended which occur during the period of disbarment or suspension are similarly not covered. Reimbursement from the CSF is a gift of grace, not a legally enforceable right. (N.B. It appears that every State bar association has a client security fund).

52. Carl H. Von Ende, Private practitioner
Chairman, Annual Meeting Coordinating Committee

Von Ende testified that 90% of annual meeting programs are educational.

53. William Couper, Private practitioner
Chairman, Committee on Libraries, Legal Research and Publications

The purpose of this committee is to foster and promote the development of facilities and materials for research and their dissemination throughout the State and to promote economically efficient access thereto while maintaining the broadest scope of the materials possible. The committee advises the state law librarian on the needs of the bar. It has studied county law libraries and drafted standards for them, and it acts as a clearinghouse for disputes between lawyers and publishers.

54. Irwin Aterman, Private practitioner
Chairman, Plain English Special Committee

This committee was formed at the request of the legislature. While many organizations outside the bar can deal with substantive or procedural improvements or academic, scholarly, or practical concerns on various legal subjects, e.g. American Law Institute, the Law Revision Commis-

sion, the Commissioners on Uniform State Laws, this committee claims to be unique in having no axe to grind. As a result, it contends that litigation over the subject of plain English will be avoided. If the bill now in the legislature is passed, the Committee will save those affected money by providing, *gratis*, suggested forms. Although the legislature rejected the committee's draft of a proposed bill, the committee is nonetheless satisfied with its work. Alterman stated that, although the cross section of opinion on the Committee could have been duplicated by the legislature acting alone, the donation of time could not.

55. R. Gerald Barr, Judge, St. Clair County
Probate Court
Chairman, Judicial Section

This section has studied court management, small claims, and child care budgets. Barr acknowledged that voluntary judges organizations exist at every level and actively lobby. The Supreme Court has an educational budget for judges, and sponsors the Michigan Judicial Institute, but the section needed State Bar funds to make up reductions in Supreme Court appropriations.

56. Sheldon Larky, Private practitioner
Chairman, Character and Fitness Committee

This is the only committee listed in the Rules Concerning the State Bar, Rule 15. This committee reports its finds to the Board of Law Examiners, and acts as prosecutor when, in the face of an adverse recommendation, the applicant demands a hearing before the Board. By statute, the committee is the investigative arm of the Board, and has subpoena powers. (Plaintiff disclaims any objection to the work of this committee.)

57. William F. Ager, Jr., Judge, Washtenaw County Circuit Court
Chairman, Ethics Committee

The charter of this committee calls for it to conform the system of justice to standards of conduct above reproach, and to give written opinions as to the propriety of professional and judicial conduct of members of the bar. A differentiation exists between informal and formal opinions; the former are approved by the committee, the latter by the Board of Commissioners. The committee cannot give opinions on actions of judges, believing only the Judicial Tenure Commission has power to do so.

58. Eugene Moore, Jr., Judge, Oakland County Probate Court;
Chairman, Crime Prevention Center Committee
Chairman, Youth Legal Education Committee

The CPCC is charged with developing community programs to prevent crime. It maintains an annual program of 3-4 workshops in conjunction with Children's Charter, geared specifically towards preventing juvenile crime and rehabilitation of juvenile offenders.

Children's Charter is a Michigan non-profit membership corporation, whose members are primarily probate court juvenile judges and social scientists. It exists to develop educational programs for judges, caseworkers, juvenile court staff and lawyers. It is financed by individual contributions, foundation grants and $1000 from the State Bar, for which the bar reaps huge returns in public goodwill.

The Youth Legal Education Committee was created to mesh with efforts of Lawyers Wives of Michigan in high

school and junior high school educational programs. Its main importance is in terms of public relations.

59. D. Michael Kratchman, Private practitioner
Chairman, Lawyer Utilization Special Committee

This committee's purpose is to investigate whether many new lawyers are unemployed. A study revealed no present problem but suggested the situation bears watching. Kratchman defined the public interest served by the committee's work as advising students of their prospects of employment after graduation from law school.

60. Alan Kellman, Executive Director
Legal Aid & Defender Association of Detroit
Chairman, Legal Aid Committee

The Legal Aid & Defender Association is a non-profit organization formed by the Detroit Bar Association in 1908, which expanded its services to criminal defense work after the 1967 riots with the help of the Detroit BA, New Detroit, Inc., and the Kresge Foundation. Since 1970, however, its leadership in providing legal aid to the indigent has been preempted by the State Bar.

The jurisdiction of Kellman's committee is to represent the interests of persons who are unable to afford counsel. The committee has worked to effectuate changes in the civil commitment process, opposed federal certification of lawyers, dealt with proposed changes in small claims court jurisdiction limits and exemptions from execution, and was instrumental in adoption of the study practice rule, GCR 921. This prompted Judge Lincoln to note that the State Bar, through this committee and others, is interfering with the process of law and skewing the political balance of a free

society.

61. Robert Roether, Private practitioner
Chairman, Civil Procedure Committee

The committee responds to and initiates changes (improvements) in civil procedure, including jury instructions, and lobbies the Michigan Supreme Court for rules changes.

62. Austin Hirschhorn, Private practitioner
Chairman, Economics of Law Committee

The committee's purpose is improvement of the economic position of the lawyer, in pursuit of which it disseminates information to assist lawyers to understand the economics of practice. The committee has promoted the use of new technology and use of non-lawyer personnel in the practice of law. The advantage to the public asserted is providing information on charges for various legal services, types of services available and on available technology.

63. H. Rollin Allen, Private practitioner
Chairman, Unauthorized Practice of Law Committee

Pursuant to State Bar Rule 16, the committee investigates and prosecutes cases involving the unauthorized practice of law, supplanting a similar committee that existed under the auspices of the Detroit Bar Association. The committee protects the public from injury at the hands of untrained people who intrude into the legal arena.

64. Nedwin L. Smokler, Private practitioner
Secretary, Latin American Bar Section, Member, Special Committee for Expansion of Under-represented Groups in the Law

Revised Standard 212 of the ABA requires law schools to

commit themselves to expanding opportunities for minorities in the law, in response to the *Bakke* decision. The committee was formed in response to the inordinately high failure rate of minority law students. (N.B. *Bakke* does not require affirmative action, but merely permits it).

65. Bert Burgoyne, Private practitioner
Chairman, Condemnation Procedure Committee

The three main activities of this committee have been revising controlling legislation in the area of condemnation (eminent domain, not health and safety), the formulation of standard jury instructions for such cases, and, 18 years ago, counseling ConCon to abolish old *sui generis* methods of condemnation. PA 1980, No. 87 is the result of 20 years of the committee's work, and the basis of the Poletown Project. Burgoyne acknowledged that the same thing could have been accomplished under any official aegis other than that of the State Bar, and in fact the Law Revision Commission contributed to the effort. Harkening back to the testimony of John Braden, Burgoyne noted that Act 87 gives property owners actual attorney fees in some situations, thus abolishing the "American Rule" in order "to achieve justice".

66. Wallace M. Handler, Private practitioner
Chairman, Expansion of Legal Practice Committee

The task of the committee is to find new areas of employment for lawyers. It has attempted to form a bar-sponsored title insurance company (after the Ohio model, a voluntary bar association), but abandoned the effort as not in the interest of the bench, bar and the public. The committee worked on the expansion of GCR 316 to counties other than Wayne, and on the idea of volunteer judges similar to FRCP

53 (N.B. Masters in chancery are prohibited by Const 1963, Art 6, § 5, carrying forward Const 1908 Art VIII, § 5; see *Frank v Schultz*, 295 Mich. 714 (1941). See *Brockman v Brockman*, 113 Mich. App. 233 (1982).

67. Patrick Durrin, Private practitioner
Chairman, U.S. Courts Committee

The committee's jurisdiction is the administration, organization, and operation of federal courts for the purpose of securing the effective administration of justice. Three members of the committee are appointed by the Chief Judges of the Michigan federal courts. Projects include lobbying for bar input on local rules changes in the Eastern District (unsuccessfully), advising the court on the competency of the bar (the "Detroit Report"), adopting a local peer review system, and obtaining space in the court buildings for lawyers to meet and counsel with their clients. The committee has not met for one year. Much of the committee's success has been attributable to the fact that the Chief Judge of the Eastern District is a former State Bar Commissioner and past president of the Detroit Bar Association.

68. Patrick Keating, President, State Bar

Keating discussed legislative activity of the bar outside the committee structure, focussing on the sections. The Real Property Section worked extensively on revising the mechanics' lien law, at the request of the legislature, resulting in a bill 85% drafted by the State Bar, the remainder "screwed up" by special interests. Keating testified that the Legislative Service Bureau, due to staff turnover, is inadequate to such a task.

69. Michael Karwoski, Assistant to the Executive Director, State Bar

Karwoski devoted himself to the task of compiling useful numbers to reflect the activities of the State Bar. Including travel time, he estimated that for the year 1979-1980, 485 members of the State Bar attended 197 meetings aggregating 15, 182 lawyer hours. Using an average hourly charge of $70 for a lawyer's time, Karwoski rated the value of this *pro bono* component at more than $1,000,000, exclusive of the contribution of the Young Lawyers Section.

Karwoski similarly estimated commissioner and Representative Assembly time, producing figures of eight meetings, averaging 20 to 25 commissioners in attendance, six hours per meeting, totalling 1000 hours plus three hours travel for an additional 480 hours. The figures for the Representative Assembly were 108-131 members, three meetings, six hours per meeting plus travel, total 3000 hours.

70. Michael Franck, Executive Director
State Bar

Mr. Franck devoted most of his testimony to clarifying a series of small points. He noted, for example, that the Lawyer Placement Service generates income which exceeds out-of-pocket expenses, but falls short of matching overhead by some $6000 per year (Exhibit 47).

Mr. Franck, in describing the State Bar's relations with the ABA, noted that $5000 in State Bar funds were spent in support of former State Bar President Wallace D. Riley's campaign for election to the office of ABA President (subsequent to the hearings, the ABA Nominating Committee agreed to send Mr. Riley's name to the House of Delegates,

this being tantamount to election).

71. Thomas J. Wynn, President
Massachusetts Bar Association

Of 18,000 lawyers in the Commonwealth, 11-12,000 are members of the MBA. Dues range from $100 for those admitted to practice more than ten years to $75 in the 5-10 year category, $25 in the 1-4 year bracket. Massachusetts has a partially unified bar; its Board of Overseers, the Supreme Judicial Court's disciplinary arm, charges mandatory dues of $75, a portion of which is allocated to the Client Security Fund.

The MBA employs 18 people, leases office space in downtown Boston (while in the process of buying a building of its own), and has an annual budget of $1,000,000. Education is provided through MCLE, but the bar hopes to reacquire CLE as a constituent organization inasmuch as it generates a substantial profit annually. Mr. Wynn noted that CLE programs are one of the few sources of profit for voluntary bar associations. Most CLE programs are aimed at lawyers, but the MBA also does "Ask the Lawyer" programs on radio and TV. The Massachusetts Bar Foundation sponsors a judicial institute, while the MBA runs a Law Day program in the high schools. There is no Lawyers Wives organization, as spouses are integrated into the mainstream of bar activities; also, two active Women's Bar Associations make such a subsidiary impolitic. The Women's Bar Associations provide free counsel on abortion, for unwed mothers, and other issue oriented public services. The MBA YLS matches the Michigan counterpart in quality and scope of activities, although Mr. Wynn felt that generally the YLS siphons quality leadership away from the central organization and expends its energies before the MBA can take

advantage of the acquired talent and experience.

The MBA has a full time paid lobbyist ("legislative counsel"), and has been an effective lobbying force. The democratic process governs the taking of positions, although minorities are free to pursue their contrary views. Most bills proposed by the association are the result of compromise and consensus, as each committee represents a cross section of the MBA. Some 2000 bills a year are screened, roughly equivalent to the Michigan experience.

Although committees and sections operate in their self interests, to be successful they must temper this with concern for the administration of justice and the public welfare. Practical politics precludes lopsided bills. The MBA lobbies all three branches of government, and like the State Bar responds to requests for assistance from all three as well. A Political Action Committee may be formed in the near future.

Each of the MBA's 11 sections publishes a newsletter, in addition to which the MBA has its own newsletter and the Massachusetts Review, a scholarly journal equivalent to a typical law journal. The MBA publishes a series of pamphlets for the public, covering such topics as small claims court, lawyers, fees and services, etc. The Lawyer Referral Service earns a tidy profit for the association, while generating, as a requirement of participation, substantial components of *pro bono* and reduced fee legal work.

The Association maintains a fee arbitration board, which deals not merely with disputes among lawyers *inter sese* but with lawyer-client problems as well. The MBA sponsors several awards, such as Legislator of the Year, and has

pressured insurance companies to reduce malpractice premiums. It hopes to be able soon to offer group professional liability insurance at such reduced premiums as will offset annual dues.

Explaining membership activity, Mr. Wynn acknowledged that perhaps 33-40% of lawyers do not belong to the MBA, but he estimated that 80% of active lawyers are members. He values the right of disgruntled members to quit the association, and notes that no one has done so, even over the issue of no-fault insurance.

72. Roger Lande, President
Iowa Bar Association

98% of the lawyers in Iowa are members of the IBA. All lawyers pay a mandatory one-time fee to the Iowa Supreme Court for licensure, and are subject to assessments for the Client Security Fund, although the low rate of claims has meant no assessment for several years. Discipline emanates from a Lawyer Grievance Commission and Ethics Committee whose members are appointed by the Supreme Court. The association's annual budget is approximately $700,000; dues are $100 for those admitted over 5 years, $75 for 1-5 years, $25 for retired or inactive lawyers, and free the first year of practice. The budget receives support in the form of $100,000 profit from CLE programs and rebates from its group life insurance program.

The IBA has some 50 committees, paralleling in scope and coverage the activity of the State Bar's many committees. Spouses are integrated into the organization's activities, so there is no wives' organization. The IBA sponsors educational programs for the bench, the bar and the public. It has a full time lobbyist and a part-time attorney-lobbyist.

If a sizeable minority dissents, the association refrains from taking a position on legislative matters, e.g., no-fault insurance. It takes positions only in the public interest, and also provides "technical assistance" at the request of committees and individuals in the legislature.

Pro Bono services are provided through the Lawyer Referral Committee and the Committee on Legal Services for the Indigent.

Lobbying is "very, very effective"; the IBA has never been defeated on an issue of importance.

The IBA YLS has won at least one ABA merit award in the past six years; the association itself gives merit awards of various kinds unsystematically. Activities run the gamut: Law Day programs, a full line of brochures and pamphlets, etc.

Some 1000 lawyers of the 6000 in the State of Iowa become actively involved annually, expending thousands of attorney hours on association business.

Lawyers not in private practice, it is to be noted, do not contribute the the Client Security Fund. In contrast to the Massachusetts BA, the IBA has never sought unification.

Institutional advertising has been conceptually rejected by the IBA which prefers to emphasize its good works rather than declaim its virtues. There are 99 county bar associations in Iowa, some so active they ran their own legal aid programs prior to the advent of the Legal Services Corporation. Still others operate their own CLE programs — a rural county BA ran a CLE program in San Francisco. Possibly the high level of bar activity is attributable to

demographic factors — the number of lawyers in each county is small enough that peer pressure forces all to maintain a minimum level of activity.

73. Dennis Ramey, Assistant Executive Director
Ohio Bar Association (non-lawyer)

The OBA has 17,000 members out of a lawyer population of 26,000. Dues are $155 for those admitted to practice more than six years ($110 out of state), $90 for three-six years, and $25 zero-two years, with a voluntary "sustaining member" category of $200. Its annual budget is $2,000,000.

Administratively, the OBA consists of 32 committees, eight sections, and the YLS, each of which has its own bylaws, board of governors, and dues. The Ohio Supreme Court has a registration rule, but the annual fee has been cancelled each of the past four years. Discipline is carried out outside the OBA, but the association spends $100,000 per year on its Office of Disciplinary Counsel. The Association donated its building, taking perpetual lease, to Ohio State University, and maintains also an Office of Governmental Affairs near the State House, where two full time lobbyists further the OBA's interests.

The OBA takes positions on 15-20 bills per month, and offers about 20 pieces of legislation drafted by its committees and sections annually.

The Ohio Legal Center Institute is the OBA's CLE arm, and is self-sustaining. In addition, law-related education for school children is provided through various programs, for which the association received an ABA Award of Merit.

One-third of the association budget goes to the produc-

tion and mailing of its weekly magazine, which contains the Ohio Supreme Court advance sheets. The remainder is expended for salaries, travel, ABA activities, etc.

The Ohio Bar Foundation, funded by sales of publications, contributions, group insurance rebates and profits from the Ohio Bar Title Insurance Company, has a full time research director and does typical foundation research.

Ramey, a Certified Association Executive, believes the OBA's lobbying activities further the administration of justice, in about the same manner as lobbying by the Ohio CPA organization, of which he was executive director.

The OBA publishes the usual brochures, sponsors typical awards, and its 96 local constituents exhibit varying levels of activity. Senior citizens are entitled to a 25% discount when using the Lawyer Referral Service. In addition to initiating legislation, the OBA responds to requests from the legislature and Governor for analytical assistance.

74. Spencer L. Kimball, Professor of Law
Executive Director
American Bar Foundation

The ABF is the research arm of the ABA, studying law and legal institutions. Its main emphasis is on the functioning of institutions rather than on substantive law.

Over the past two centuries, the bar has achieved a unity with the bench in terms of dedication to justice that matches that prevailing in England from the 17th to 19th centuries. By virtue of tradition, rather than any moral imperative, the bench regulates the bar, and has a correlative duty to insure that the profession operates in a fair and just manner.

Professor Kimball considers Justice Frankfurter's practice of acting as advisor to President Roosevelt during his tenure on the bench a violation of the spirit of the Anglo-American system of justice (N.B. Cf. *Matter of Hague*, 412 Mich ____(slip opinion, pp. 17 ff.). He views restrictions on retired judges seeking political office (only one year or more after leaving the bench; see Canon 7A.(3) of the Code of Judicial Conduct) as deleterious to the public interest, commenting: "The protection should be built into the ethical value system of the profession rather than artificial rules that make it impractical for them to live in the real world."

According to Kimball, the role of the profession in the administration of justice, beyond representing clients, is large but limited, and subject to debate. An empirical study of the Chicago BA shows that a broadly based, representative association provides an excellent forum for debate of issues which is disabled from expressing strong positions. There is no extant study demographically comparing unified and voluntary bars in this respect, but the ABF anticipates completing such a study by December, 1982.

In order to oversee the admissions process and discipline, some form of bar organization is mandatory; these are, unfortunately, matters on which the bar nationwide has done a poor job. Discipline needs to be "more broadly administered by somebody who will eliminate the incompetent and corrupt from the profession." (N.B. This accords with the testimony of Mr. Ballenger).

Contrary to suggestions made by the State Bar, lawyers are over represented, not under represented, at every level of the legislative, executive and judicial branches of government in comparison with their portion of the population.

Voluntary and unified bars, from Mr. Kimball's expert overview, serve the public approximately equally. The legal profession has a unique perspective to offer on many, but by no means all, issues, and the courts should actively monitor the bar's lobbying activities and limit the bar to matters within its special expertise, keeping it out of political questions (using "political" in the broad sense, not restricted to "partisan political"). Some kinds of education, other than CLE, might well not be the proper function of the bar. Referring to the State Bar's funding of Mr. Riley's campaign for the ABA presidency, Mr. Kimball flatly stated it is improper to use compulsory dues to support any kind of candidate for any office, other perhaps than judicial office.

75. James J. Bierbower, President
District of Columbia Bar

The DC bar is a forced association, with 36-38,000 members. Dues are $45 per year for active members, $20 for inactive. Approximately 75,000 members are inactive.

For 100 years, the District had a voluntary bar, then in the 60's the need for a unified bar became apparent — recreant lawyers were not subject to discipline if they were members of the bar of another jurisdiction.

The mandatory bar's Lawyer Referral Service is self-funded, and includes a matching *pro bono* requirement. Lawyers participate in the service to generate business for themselves.

The Client Security Fund of the mandatory bar has no upper limit officially. The bar considered forming its own malpractice insurance company, but rejected the idea because several large private firms have an insular arrange-

ment that makes the notion impracticable.

By referendum, use of mandatory dues to support CLE, LRS and information service programs was terminated. However, a letter requesting voluntary support generated $250,000. CLE actually makes a profit, so much so that other groups are trying to get a piece of the action.

There are many other lawyer organizations in the District, several of whom work on Law Day activities. Lawyers Wives of Washington sponsors a public school essay contest, and generally Law Day is well taken care of.

The fight over funding Legal Services Corporation was described by Mr. Bierbower as "front page news", a major political controversy (N.B. See testimony of John Braden). The lawyers in the District support a very active, strong legal aid program, all with voluntary contributions.

Before a referendum eliminated mandatory bar lobbying activities, it found itself in occasional conflict before the legislature with the voluntary bar. After the mandatory bar found its ability to use compulsory dues restricted, voluntary contributions permitted all programming to continue, with no reduction in scope or level of activities. Mr. Bierbower, who was previously President of the voluntary bar, feels he can get all the money needed simply by asking members for it. He is pleased with the new order, since it eliminates internal strife in the organization without reducing the ability of the bar to serve the public interest.

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No. 84-319

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ALLAN FALK,

Appellant,

vs.

STATE BAR OF MICHIGAN, a
Public Body Corporate,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

APPELLEE'S MOTION TO DISMISS OR AFFIRM
AND
APPENDIX

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No. 84-319

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ALLAN FALK,

Appellant,

vs.

STATE BAR OF MICHIGAN, a Public Body Corporate,

*Appellee**

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

APPELLEE'S MOTION TO DISMISS OR AFFIRM

STATEMENT OF THE CASE

Appellant is a lawyer licensed to practice in Michigan and is required by Rule of the Michigan Supreme Court to be a member of its integrated Bar. As an integrated bar, the State Bar of Michigan (hereinafter, sometimes, "the State Bar"), is a "public body corporate" created by sovereign act of the Michigan Legislature[1] and pursuant to the Supreme Court of Michi-

*Pursuant to Sup.Ct.R. 28.1, Appellee, State Bar of Michigan, advises that it is a Public Body Corporate of the State of Michigan, created by Act of the Michigan Legislature and pursuant to the inherent powers of the Supreme Court of Michigan. *See* note 1 *infra.* It has no parent, subsidiary or affiliate corporation.

[1]1935 Mich. Pub. Acts 58, *as amended,* 1947 Mich. Pub. Acts 34, *subsequently superceded,* 1962 Mich. Pub. Acts 236, *presently codified in,* Mich. Comp. Laws §§ 600.901 & .904 (1979). (App. 55b).

gan's inherent power[2] to control the legal profession and the administration of justice within the State. By Michigan Supreme Court Rules Concerning the State Bar of Michigan, a lawyer to be allowed to practice is required to be a member of and — in order to maintain membership — must pay annual dues to the State Bar.[3] Rule 1 in particular describes Appellee's origin and purpose. (App. 56b).

Following this Court's decision in *Abood* v *Detroit Bd. of Educ.*, 431 U.S. 209 (1977), Appellant maintained, in the Supreme Court of Michigan, that he did not agree with, or support various activities of the State Bar. Therefore, according to his reading of *Abood* a pro-rata share of his compulsory mandated bar dues could not constitutionally be exacted to sustain such activities.[4] Relying upon his understanding of *Abood*, Mr. Falk characterized his First Amendment interest as one of non-association.

(Interestingly, however, he has frequently conceded (J.S. at 9, 20), that the concept of the unified or compulsory bar is itself not violative of the First Amendment. His First Amendment arguments are, therefore, significantly limited by this concession. *See Ellis* v *Brotherhood of Railway, Airline & Steamship Clerks*, 104 S.Ct. 1883, 1896 (1984) [sometimes hereafter, *Ellis* or *Ellis* v *Railway Clerks*]).

Rather, in Appellant's view, the State Bar only infringes upon the right to non-association if it acts in a fashion which is either not to his liking or not to his monetary advantage, or contrary to his conscience or subjective beliefs.

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[2]*See* (J.S. App. 77-84 [411 Mich. 124-31]).

[3]*Mich. Sup. Ct. Rules Concerning the State Bar of Mich.*, 1, 2, 3, 4; Mich. Comp. Laws §§ 600.901 (last sentence) & 600.904 (1979). (App. 55b-59b). The Michigan statutes defer completely to the Supreme Court of Michigan to define the requirements for practicing law and to regulate the State Bar.

[4]Record, *Petition for Special Relief dd. Nov. 30, 1977* ¶1(g), at 3.

Seminal to these contentions is Appellant's claim that he is not a "practicing lawyer", albeit he submits that being licensed is a condition of his employment.[5] He further maintains he may not engage in private practice in his present position.[6] Many of the Bar's subsidized activities are assailed, therefore, from his personally utilitarian perspective as devoid of economic benefit to Appellant. (J.S. App. 18 [418 Mich. at 294]).

In all, Appellant initially complained of some eleven (11) Bar activities.[7] Three of these were mooted while the case was pending in state court, (J.S. App. [418 Mich. at 280]),[8] and at least two others were abandoned by exclusion from the Juris-

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[5]Appellant is a Commissioner of the Michigan Court of Appeals. No Michigan statute, court rule or regulation either creates or describes the office or duties of such a Commissioner. The Record does include Appellant's own testimony that touches upon his employment, but it is far from certain whether his duties are clerical, ministerial, advisory or some combination thereof. Record, *Appendix of State Bar filed in Mich. Sup. Ct. dd. May 25, 1979* at 251b-254b. As the Record presently stands, the only thing that has been established is that Mr. Falk voluntarily elected to sit for the Michigan Bar examination and thereby became a duly licensed Michigan attorney in 1972. Record, *Appendix of State Bar filed in Mich. Sup. Ct. dd. May 25, 1979* at 251b & 257b.

[6]Mr. Falk never challenged the purported prohibition on private practice, although it effectuates a *direct* infringement upon an *affirmative* right of association (with clients and with other lawyers, groups or assocaitons). Presumably this does not entirely eradicate Mr. Falk's present claims, but it does demonstrate his utilitarian complaints are arbitrarily selective, based upon a false predicate and not so onerous as he would have them appear. Mr. Falk has simply and freely chosen not to involve himself in active practice and the concerns surrounding it.

[7]The Michigan Court set forth the original eleven (11) challenges on both occasions the matter came before it. (J.S. App. 3 [418 Mich. at 279]; 73 [411 Mich. at 120]).

[8]During the pendency of the matter in the Michigan Court, Appellee voluntarily implemented a procedure for otherwise eligible members to disassociate themselves from the Young Lawyers' Section. (Certain activities of the Section, however, remained the 'live' objects of Appellant's protest). Also, despite repeated misunderstanding of the nature of the use of the Bar's roster or mailing list for what Appellant alleged were "commercial" purposes, the issue has been completely resolved, and therefore, mooted.

dictional Statement.[9] Mr. Falk's remaining objections now readily fall into but a few principal categories: 1) activities designed to foster public awareness of, and access to legal services and activities that protect clients from unscrupulous Michigan attorneys who misappropriate their funds held in escrow; 2) funding of social activities; and 3) legislative contacts, efforts to influence legislation (or "lobbying")[10], and allegations concerning 'other political' activities.[11]

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[9]Funding of Lawyers' Wives of Michigan (except to the extent that group is involved in public education about legal services) and support for the Children's Charter of Michigan are not asserted in the Jurisdictional Statement and must be presumed to have been abandoned. Sup.Ct.R. 15.1(a); *Quilloin v. Walcott*, 434 U.S. 246 (1978). Appellant's failure to here renew his unsuccessful complaints about the State Bar's monthly publication, *The Michigan Bar Journal* (a contention which was not listed by the Michigan Court — *see* (J.S. App. 3 [418 Mich. at 279]; 73 [411 Mich. at 120])) precludes review in this Court.

[10]The challenged conduct hardly constitutes "lobbying" in the full pejorative sense the term has come to connote. The Second Fact-finder readily found *see* (App. 14b-16b, 19b) that the vast majority of the State Bar's legislative contacts constituted technical assistance in drafting legislation — a desirable service performed not only without cost, *see Mich. Sup. Ct. R. Concerning State Bar of Mich.* 9 (App. 66b) but one for which there was no available alternative. (App. 14b-16b). Conversely, the small remainder of the State Bar's dealings with the Legislature which might be characterized as "lobbying" or attempts to influence legislation comprised but a fraction of the Bar's efforts in this arena. For example, in the 1979-80 session, some 4000-5000 bills were introduced. The Bar took a "pro" or "con" position on but 78 of those bills and only actively pursued or "lobbied" its position on 40 of that 78. All 78 proposed legislative Acts were directly involved in the administration and effectuation of the Michigan justice system. Record, *Testimony of Francis J. Coomes dd. Aug. 28, 1981* at 70-71.

[11]Appellant has claimed Appellee improperly funded a member's campaign for the presidency of the American Bar Association. This contention is not properly before the Court. The allegedly inappropriate expenditure occurred on September 17, 1979 — well before the time the Michigan Court rendered its first set of opinions on April 29, 1981. Nevertheless, Appellant never sought leave to amend his Petition for Special Relief (Mich. Gen. Ct. R., 118.1) to complain about such an expenditure prior to that time; indeed, he *never* sought leave to so amend at *any* time. *None* of the members of the Michigan Court addressed or even mentioned the claim in any of the final sets of opinions; they apparently did not believe such a claim was before them even under the "relaxed" practice employed in this extraordinary proceeding. Also, the majority held that *Falk I* was the "law of the case."

Appellant, on November 30, 1977, elected to commence an original proceeding in the Supreme Court of Michigan invoking that Court's extraordinary and exclusive power to superintend Appellee. (J.S. App. 39, 119 [411 Mich. at 86, 166]. The initiating pleading, "a Petition for Special Relief", only prayed the Petition be granted and, according to the Michigan Court was neither a complaint nor did it state a cause of action under local law and procedure. (J.S. App. 38-39 & n.3, 119 & n.1 [411 Mich. at 85-86 & n.3, 166 & n.1]).[12] Significantly Appellant did not assert his constitutional claims in a state cause of action, (J.S. App. 119 & n.1 [411 Mich. at 166 & n.1]; 23-24 [418 Mich. at 299-300]), nor did he bring an actionable cause in the United States District Court (or state court), pursuant to 42 U.S.C. § 1983 (1982) against officials of Appellee or members of the Michigan Court for deprivation of federally protected rights under color of state law.[13]

By this tactical election, Appellant unquestionably sought a purely state law based inquiry into, and regulation of the State

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Therefore, only those issues presented in *Falk I* which were not definitively decided needed to be resolved. (J.S. App. 3-4, 24-26, 29 & n.4 [418 Mich. at 277-79, 300-302, 305 & n.4]). Of course, this Court has no jurisdiction to entertain questions not properly raised below, and, hence, were not considered or decided by the state court. *McKeesport Area Sch. Dist. v. Pennsylvania Dep't Educ.*, 446 U.S. 970, 976 (1980) (White, J., concurring); *Crowell v. Randell*, 10 Pet. 368, 396, 397-98 (1836). *See* R. Stern & E. Gressman, *Supreme Court Practice* §3.27, at 214 (5th ed. 1978).

[12]The only possible support for the conclusion that Appellant stated a cause of action was Justice Ryan's innocuous and patently erroneous allusion to the First Amendment giving rise to some generalized cause of action. (J.S. App. 66-67 [411 Mich. at 113-14]). Although this Court has held that an implied cause of action arises under 28 U.S.C. § 1331 (1982) for violations of the Fourth, Fifth and Eighth Amendments, *e.g., Bivens v. Six Unknown Fed. Narcotic Agents*, 403 U.S. 388 (1971); *Davis v. Passman*, 442 U.S. 228 (1979); *Carlson v. Green*, 446 U.S. 14 (1980), those cases contemplate suits in federal court against federal officials. Generalized constitutional implied causes of action have never been authorized by the Court, particularly in instances such as this where fully adequate causes of action to vindicate the particular claims exist, but simply were not employed. *See Carlson v. Green*, 446 U.S. at 18-23.

[13]*See* note 21 *infra*.

Bar, more than he sought an adjudication of his personal constitutional rights. Correlatively, the "action" was directed solely at the State Bar *qua* an entity of, and indivisible from the Michigan Court and not at its officials for unconstitutional actions. Indeed, Appellant's own testimony reveals that —

> "One of my motives in bringing this suit and relevant to this action, to the extent the Supreme Court [of Michigan] through its advisory power might, for policy reasons, determine to deunify the Bar to some extent, ..."[14]

Certain institutional or strategic benefits also were derived from proceeding in such a fashion. For example, Appellant's forum selection permitted a complete bypass of Michigan's intermediate appellate and trial courts. Moreover, the Michigan Court could expand the issues far beyond the scope of the litigant's interests; abandon rules of procedure circumscribing ordinary lawsuits; modify (or indeed deunify) Appellee for reasons wholly unrelated to the Appellant's claims; and most importantly, render advisory-type rulings on the constitutional implications of the Bar's activities, notwithstanding the fact that no actionable claim was before it. (J.S. App. 1 [418 Mich at 277]; 119-20 & n.1 [411 Mich. at 166-67 & n.1]). *See also* (J.S. App. 75 & n.4 [411 Mich at 122 & n.4]; 2-3, 23-24 [418 Mich. at 278-79, 299-300]). As Justice Levin aptly noted, this matter was in the nature of a rule-making proceeding but in no event was it a lawsuit. (J.S. App. 119-20 & n.1 [411 Mich. at 166-67 & n.1]; 23-24 [418 Mich. at 299-300]).[15] The analogue

[14]Record, *Appendix of State bar filed in Mich. Sup. Ct. dd. May 25, 1979* at 252b.

[15]Appellant attempts to gloss over a significant hurdle to justiciability by characterizing Justice Levin's comments as a "procedural point" rejected by other members of the Michigan Court. (J.S. at 2-3). In fact, the Justices who did comment upon how the case was presented, merely elected to consider the matter as a complaint for superintending control within their original jurisdiction to supervise Appellee citing, *inter alia*, Mich. Comp. Laws §§ 600.215, & .219 (1979). *See* (J.S. App. 38-40, 75 & n.4 [411 Mich. at 85-87, 122 & n.4]; 2-3 [418 Mich. at 278-79]). In Michigan, superintending control is a remedy that does not necessarily require the presence of an

Appellee found most helpful was that of a Royal Commission or Judicial Inquiry but, invariably, adversarial litigation in any real or conventional sense was never contemplated.

Appellee answered the Petition denying the constitutional contentions, and the Michigan Court appointed a First Fact-finder, the Hon. Maurice E. Schoenberger, to conduct a hearing. 402 Mich. 960 (1978). Two full days (June 5 & 6, 1978) were dedicated to the proffering of exhibits and the eliciting of testimony from three witnesses; a former President of Appellee, the Executive Director of Appellee and the Appellant. On September 29, 1978, the First Fact-finder submitted a Report to the Michigan Court. (App. 316-556). This was followed by extensive briefing and oral argument was heard on June 5, 1979. 406 Mich. 1117 (1979).

A per curiam Order, 411 Mich. 63, 305 N.W.2d 201 (1981) and seriatim opinions were issued by the Michigan Court on April 29, 1981. (J.S. App. 37, 73, 118 [411 Mich. at 84, 120, 165]). A majority could not be mustered on either reasoning or remedy. The principal disagreement involved the standard or analytic construct to be used with respect to the First Amendment contentions, or put another way, there existed an interminable dispute as to how to read and apply *Abood*.[16] The Justices inability to obtain a clear majority on matters of substance

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actual adversarial controversy or actionable claim. *See, e.g., In re Hague*, 412 Mich. 532, 545-47, 315 N.W.2d 524, 529-30 (1982); *In re Probert*, 411 Mich. 210, 229-30, 308 N.W.2d 773, 778-79 (1981); *In re Huff*, 352 Mich. 402, 417-18, 91 N.W.2d 613, 620 (1958). Moreover, none of the other opinions directly rejected Justice Levin's comments. *See* (J.S. App. 38-40, 75 & n.4 [411 Mich. at 85-87, 122 & n.4]; 2-3 [418 Mich. at 278-79]). Justices Levin and Kavanagh merely elected to give their advisory thoughts on some, but not all of the constitutional issues implicated, while their colleagues felt free to opine in the abstract on any subject or issue deemed relevant to the Inquiry.

[16]The disparity of readings of *Abood* would appear to have been definitively resolved by this Court in favor of the position advocated by Appellee and adopted by Justice Williams and Chief Justice Coleman. *See Ellis v. Railway Clerks*, 104 S.Ct. at 1892, 1896-97.

prompted unanimous agreement to remand for further hearings and record development. (J.S. App. 36 [411 Mich. at 83]). The Hon. James H. Lincoln was appointed as the Second Fact-finder to conduct the additional hearings.

On remand, Judge Lincoln conducted an exhaustive and vigorous Judicial Inquiry into the functions and operations of Appellee. He required, *inter alia*, the Bar to produce the Chair or other representative of each of its fifty-two (52) committees, as well as the President or Executive Director of the voluntary bar associations of Iowa, Massachusetts, Ohio and the voluntary/involuntary District of Columbia Bar. In all, eighty-three (83) witnesses, over a period of twelve (12) full trial days, were presented, underwent cross-examination and, most importantly, were subjected to vigorous inquiry from the Fact-finder. Several thousands of pages of documents were accepted as exhibits. This experience was unique in the life of the organized bar, voluntary or involuntary, anywhere in this Country. The life of the State Bar was thoroughly explored, examined and investigated in a way never before experienced by any profession in the United States. Interestingly, Appellant failed to appear at a number of the hearing sessions, trusting counsel for Appellee and the Fact-finder to fully protect his interests.

On March 27, 1982, the Hearing Officer filed his Report including Findings of Fact, Conclusions and Recommendations. (App. 3b-31b). Those findings sustained, as matters of fact, the vast majority of Appellee's challenged activities under even the most exacting constitutional standards. *See* (App. 8b-26b). The Hearing Officer refrained from deciding the constitutional questions because such were not within his charge.

Judge Lincoln, however, did suggest that various minor modifications be adopted and that the Michigan Court should promulgate certain procedural requirements pursuant to its supervisory powers — such recommendations being based upon his unique knowledge of the Record. With the exception

of certain proposals going to the mechanics of notice and voting, his suggestions were voluntarily implemented by the Bar prior to the second round of oral argument.

In making his Findings, Judge Lincoln specifically relied upon the entire Record and refused to summarize the testimony, concluding that the Michigan Court would necessarily have to rely directly upon the Record in any event. (App. 3b-4b). Nevertheless, Appellant filed his Brief on Remand accompanied by a self-serving summary of the testimony of the witnesses. Appellee filed its Brief on Remand and adopted, *in toto*, the facts as found by the Hearing Officer.[17] Appellant filed a reply Brief, and a second round of oral argument was entertained by the Michigan Court on March 3, 1983.

On December 29, 1983, a second set of seriatim opinions and a per curiam Order dismissing the Petition for Special Relief were issued by the Michigan Court. 418 Mich. 270, 342 N.W.2d 504 (1983). After concluding that *Falk I* had dispositively approved certain Bar activities and hence could not be reexamined, Justice Boyle's lead opinion reasonably articulated yet another standard for reviewing the constitutional problems and found that none of the challenged activities were imper-

[17]Appellant continues to insist upon the importance of his own self-serving witness summary by including it in his Appendix (J.S. App. 5a-45a) and by making reference to it "as crucial to an understanding of the issues herein presented." (J.S. at 9). This is done, however, at the expense of excluding from those appended materials, the Reports and Findings of Fact of both Fact-finders — items Appellant must present to this Court. Sup.Ct.R. 15.1 (j)(ii). The contention that Appellee somehow accepted this witness summary under local procedure by not proposing a "counter statement of facts" is entirely misguided. Appellee explicitly adopted the findings of the Second Fact-finder — the judicial functionary exclusively entrusted with fact determination and who, himself, refused to rely upon litigant summaries or to commend them to the Michigan Court. Indeed, a majority of that Court adopted those findings and saw nothing whatsoever improper in Appellee's doing the same in original proceedings. Appellant's reliance upon the minority's position on this point articulated in a footnote is therefore irrefutably defeated and of no significance. The Record itself, and not Appellant's characterization or summary of it, is solely before this Court.

missible under the First Amendment.[18] Chief Justice Williams concurred. Justices Kavanaugh and Levin, who had earlier sought the expanded record development, adhered to their belief that the matter was not a lawsuit but more in the nature of rule making proceedings; that the matter had only been entertained by the Michigan Court in its capacity to regulate

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[18]Justice Boyle, through a careful exegesis of decisions of this Court addressing negative First Amendment, or non-association claims, held it imperative to balance the severity of injury to the individual interest, if existent, against the magnitude of the governmental interest to be served by the infringing requirement or regulation. (J.S. App. 6-11, 11-16 [418 Mich. at 282-87, 287-92]), *citing, Prune Yard Shopping Center v. Robins*, 447 U.S. 74 (1980); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Wooley v. Maynard*, 430 U.S. 705 (1977); *Lathrop v. Donohue*, 367 U.S. 820 (1961); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). For analytic purposes, Justice Boyle categorized the contested activities into the "Political" and "Non-Political." (J.S. App. 16-17 [418 Mich. at 292-93]).

With respect to "Non-Political" activities, she opined that no First Amendment interests were implicated and, even if it could be assumed that such "activities could be characterized as encompassing some ideological content, any asserted connection with the Appellant would be far too attenuated to constitute a burden on the freedom of conscience that underlies negative First Amendment protection." (J.S. App. 18 [418 Mich. at 294]). Additionally, the "Non-Political" activities were also perceived as fairly within the normal functionings of a constitutionality valid integrated bar. (J.S. App. 19 [418 Mich. at 295]).

In contrast, "Political" activities were said to cause a "more complete application of the constitutional test." *Id.* Although "some cognizable First Amendment injury" ensued, the challenged activities were thought to be easily sustained. The State's compelling interest in receiving expert participation in the legislative process by the Bar clearly outweighed any minor infringement. Also, she noted Appellant is not forced to express personal agreement with the "political" positions of the Bar and indeed is completely free to take contrary public positions. Therefore, his connection to the compelled expression is remote, or at best is clearly not sufficiently intimate to be impermissible. (J.S. App. 20-21 [418 Mich. at 296-97]). Justice Boyle further stated (as did the Fact-finder) that the Legislature had a keen interest in obtaining advice from the Bar, which is "made up of lawyers whose business necessarily entails knowing, understanding, utilizing and interpreting the law." (J.S. App. 21 [418 Mich. at 297]). In this respect, the State Bar was perceived as qualitatively different from the labor union involved in *Abood*. The Bar brings (at no cost) "its collective experience in working with the law to the lobbying efforts and technical advice which it offers the Legislature" (J.S. App. 22 [418 Mich. at 298]) — a unique service which has no counterpart. (App. 23b-26b). Accordingly, the Boyle Opinion justified Appellee's "Political" Activities. (J.S. App. 22-21 [418 Mich. at 298-99]).

the conduct of the Bar; and, accordingly, it "should await a proceeding wherein it is necessary for decision to reach the constitutional questions." (J.S. App. 24 [418 Mich. at 300]). Justice Ryan reiterated the position adopted in his earlier opinion (J.S. App. 24-29 [418 Mich. at 300-305]) which he attempted to apply to the challenged activities believed either not to have been addressed in *Falk I* or not mooted in the interim. Some activities were said to be justified while others were said to be unsustainable. (J.S. App. 31-34 [418 Mich. at 307-10]). Justices Brickley and Cavanagh concurred in that minority opinion. Appellant sought rehearing in a timely fashion under local procedure, which was denied on March 6, 1984. (J.S. App. 1a).

The last paragraph of the per curiam Order dismissing the Petition readily demonstrates that the proceedings were not adversarial nor did they constitute litigation, in any controversial sense.

> "This proceeding has convinced us all, however, that certain practices of the State Bar may warrant closer scrutiny pursuant to our duty to superintend its activities. We will in the near future, therefore, by separate administrative order, appoint a committee to review those practices and activities and make recommendations to the Court."
> (J.S. App. 1 [418 Mich. at 277]).

On January 31, 1984, an Order was entered pursuant to the Michigan Court's power to superintend Appellee which created such a Committee. (App. 1b-2b). The Committee made its report to the Court on September 17, 1984, and as of this date, neither has the report been made public nor has the Michigan Court taken any action on it.

On May 24, 1984, Appellant filed a Notice of Appeal to this Court. The Clerk of this Court rejected the Jurisdictional Statement submitted on May 30, 1984 because it did not conform with the form mandated by Rule. Appellant did not submit acceptable copies until on or about September 1, 1984 (the date they were received by Appellee) — one hundred and

ninety (190) days from the Michigan Court's March 6th denial of rehearing and ninety-four (94) days from the May 30th defective submission.

THE COURT'S JURISDICTION

A. This Matter Is Not Within The Court's Appellate Jurisdiction Conferred By 28 U.S.C. § 1257(2).

The Record, as reflected in the papers filed in this and the Michigan Court, does not reveal that Appellant explicitly challenged the validity, as applied, of the Michigan Statutes or the Rules Concerning the State Bar cited by him in his Jurisdictional Statement. Rather, it only shows that he attacked particular activities of the Bar on federal constitutional grounds. There is therefore no jurisdiction under 28 U.S.C. § 1257(2) (1982).[19] The matter is reviewable, if at all, only by way of the Court's certiorari jurisdiction under 28 U.S.C. § 1257(3) (1982). Although the Court invariably has discretionary power to treat the papers as a petition for certiorari, 28 U.S.C. § 2103 (1982), Appellant never sought such alternative relief. *See Bellotti* v *Connolly,* 103 S.Ct. 1510 (1983) (appeal dismissed, certiorari denied after treating papers as a petition).

B. Justiciability

Since the earliest dasy of the Republic, this Court has been loathe to render advisory opinions. *Hayburn's Case,* 2 Dall. 409

[19] *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 562-63 n.4 (1980); *Kulko v. Superior Court,* 436 U.S. 84, 90 & n.4 (1978); *Hanson v. Denckla,* 357 U.S. 235, 244 & n.4 (1958); *Charleston Fed. Sav & Loan Ass'n v. Alderson,* 324 U.S. 182, 185-87 (1945). *See also Calder v. Jones,* 104 S.Ct. 1482, 1486 & n.7 (1984); *Silkwood v. Kerr-McGee Corp.,* 104 S.Ct. 615, 620-21 & n.9 (1984) ("statutes authorizing appeals are to be strictly construed."); R. Stern & E. Gressman, *Supreme Court Practice* 163-164 (5th ed. 1978); 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice & Procedure: Jurisdiction* § 4012, at 618 & nn.51 & 53 (1977).

Appellant's attempt to reply on *Lathrop v. Donohue,* 367 U.S. 820 (1961) (J.S. at 2), is thoroughly misplaced. At every juncture below, Lathrop (unlike Falk) explicitly challenged the validity of the Wisconsin Court Directive and Rules as repugnant to the Constitution. Record, *Lathrop v. Donohue,* at 6, (Orig. Complaint ¶20, at 6, Wisc. Cir. Ct., Dade County, dd. June 9, 1959).

(1792). This reluctance eminates from Art. III, §2's actual "case or controversy" requirement and has repeatedly been reiterated.[20] Even to review a duly entered state court judgment involving federal issues, the Court must determine if a "case or controversy" exists. As Mr. Justice Jackson once observed, "[w]e do not undertake to say that a state court may not render an opinion on a federal constitutional question even under such circumstances that it can be regarded only as advisory. But, because our own jurisdiction is cast in terms of "case or controversy," we cannot accept as the basis for review, nor as the basis for conclusive disposition of an issue of federal law without review, any procedure which does not constitute such." *Doremus* v *Board of Educ.*, 342 U.S. 429, 434 (1952) (appeal dismissed in taxpayer's First Amendment challenge to state expenditure for school Bible readings). *See also Goldwater* v *Carter*, 444 U.S. 996, 1005 & n.2 (1979) (Rehnquist, J., concurring); *Bateman* v *Arizona*, 429 U.S. 1302, 1305 (1976) (Rehnquist, J., in chambers).

As discussed, the Michigan Court did not entertain this matter as a ordinary lawsuit nor did Appellant present an actionable claim as a matter of primary remedial law. Indeed, the Fact-finder and the Michigan Court expanded the issues to be explored, following the trail of their curiosity and interest where-ever that might lead — hardly the narrow, restrained or reluctant variety of judicial review that must attend adjudication of constitutional claims in adversarial contexts. *Marbury* v *Madison*, 1 Cranch 137 (1803). *See also Allen* v *Wright*, 104 S.Ct. 3315, 3325 (1984); *Chicago & Grand Trunk R. R.* v *Wellman*, 143 U.S. 339, 345 (1892).

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[20]*E.g., Allen v. Wright*, 104 S.Ct. 3315, 3324 (1984); *Princeton University v. Schmid*, 455 U.S. 100, 102 (1982); *Valley Forge College v. Americans United for Separation of Church & State*, 454 U.S. 464, 472-73 (1982); *O'Shea v. Littleton*, 414 U.S. 488 (1974); *Flast v. Cohen*, 392 U.S. 83 (1968); *United Public Workers v. Mitchell*, 330 U.S. 75, 89 (1947); *Muskrat v. United States*, 219 U.S. 346 (1911).

Rather, the proceedings were unquestionably directed at regulation of the State Bar as an indivisible part of the Michigan Court. Appellant invoked that Court's exclusive and extraordinary authority to supervise the Bar by instituting his "suit" in that forum and in the hope it would be "deunified." Correlatively, thereby, he also specifically elected *not* to proceed on viable causes of action to adjudicate his personal constitutional claims — claims that had to be prosecuted in the other forums devoid of such extraordinary authority.[21] Although discussed by some members of the Michigan Court, Falk's personal claims were only considered in the sense they catalytically prompted broad inquiry into the functionings of the Appellee — the primary, if not sole purpose of the proceed-

[21]Appellant could have proceeded in the Michigan Court of Appeals or Circuit Court with an ordinary lawsuit or action for mandamus against a state official. (J.S. App. 119 & n.1 [411 Mich. at 166-67 & n.1]). Suit against the State Bar *qua* the State Bar, however, would have been precluded, as those Courts are devoid of supervisory authority. Similarly, a United States District Court suit to enjoin First Amendment deprivations under 42 U.S.C. § 1983 (1982), could not have proceeded against the State Bar *qua* State Bar because it is not a "person" within the meaning of that statute, *Clark v. Washington*, 366 F.2d 678, 681 (9th Cir. 1966); *Louis v. Supreme Court of Nev.*, 490 F.Supp. 1174, 1180 (D. Nev. 1980), and because it is not amenable to suit in federal court by virtue of the Eleventh Amendment. *O'Connor v. Nevada*, 507 F.Supp. 546, 550 (D. Nev. 1981). Although *Ex Parte Young*, 209 U.S. 123 (1980), would permit suit against state *officials* for such deprivations, a federal court would not, of course, have supervisory or regulatory powers over the Bar. In fact, the Defendants to such an action would have to be the very persons who exercise regulatory power over the Bar — the Justices of the Supreme Court of Michigan. *Cf. Supreme Court of Va. v. Consumers Union of the United States, Inc.*, 446 U.S. 719 (1980). A § 1983 claim against the Bar, as opposed to the Justices, would not be justiciable since it is under their exclusive control. The Bar may only make recommendations and, therefore, "no effective order [could] be entered against the State Bar to afford the Plaintiff the relief [he] seeks." *Louis v. Supreme Court of Nev.*, 490 F.Supp. at 1180. *See* note 25 *infra* & accompanying text.

Mr. Falk eschewed all of the limitations placed on ordinary litigants by invoking the supervisory powers of the Michigan Court. Inherent in that invocation, however, was the failure to properly preserve his individual constitutional claims. The fact that federal questions were presented in that context, and further that they initiated or catalytically induced the Judicial Inquiry, only shows that they were presented, not that the underlying suit is a "case or controversy."

ings. In this respect, the matter lacks important indicia in the "blend of constitutional requirements and prudential considerations" which make up the notion of justiciability under Art. III. *Valley Force College* v *Americans United for Separation of Church & State,* 454 U.S. 464, 471 (1982); *Warth* v *Seldin,* 422 U.S. 490, 498 (1975).

First, the free-roaming inquiry conducted by the Fact-finder took on many of the characteristics of a "publicly funded forum for the ventilation of public grievances or the refinement of jurisprudential understanding"; or in a word (and at its best) it was a "a judicial version of [a] college debating forum" clearly foreclosed by the "cases and controversies" language of Art. III. *Valley Forge College* v *Americans United,* 454 U.S. at 473. The Michigan Court's expansionist consideration of the constitutional implications to the Bar's activities was not only appropriate, but commendable in the context of examining the Bar as its symbiotic partner in the State's justice system. But precisely what made the proceedings so commendable in that context, make them ill-suited for this Court to resolve grave constitutional questions pursuant to an exercise of Art. III power. The Michigan Court ambitiously took on the "abstract questions of wide public significance" which amounted to "generalized grievances"; questions from which an Art. III Court must unquestionably abjure. *Id.* at 475. Unlike the Michigan Court, this Court is not empowered to consider "prevasively shared grievances" in a representative, political or even in a non-adjudicatory, rulemaking capacity, *id.*; nor does it "sit to decide hypothetical issues or to give advisory opinions . . .". *Princeton University* v *Schmid,* 455 U.S. 100, 102 (1982).

Second, and as an overlapping consideration, "'federal courts may exercise power only in the last resort, and as a necessity,' *Chicago & Grand Trunk R.R.* v *Wellman,* 143 U.S. 339, 345 (1892), and only when adjudication is consistent with a system of separated powers and [the dispute is one] traditionally

thought to be capable of resolution through the judicial powers, *Flast* v *Cohen*, 392 U.S. 83, 97 (1968)." *Allen* v *Wright*, 104 S.Ct. at 3325. The Michigan Court's Herculean attempt to evaluate the Bar's life and actions spawned additional questions and prompted more, yet unresolved inquiry. The matter is thus unsuited to "last resort" and necessity oriented adjudication.

Third, the Fact-finder's and Appellee's Counsel's presentation of Mr. Falk's views or interests in his absence, as well as repeated concessions by the Bar of the extraordinary power (even to deunify) of the Michigan Court in these regulatory proceedings, aptly evidences that counsel neither adopted an adversarial posture nor an advocate's attitude —an approach that would have been patently out of order had an actual case or controversy been asserted against a client for alleged constitutional deprivations. Similarly, the Fact-finder would have proceeded far differently in the fact of a sufficiently concrete controversy. For example, neither rules of evidence nor procedure governing lawsuits were observed, for they were not in the least helpful *See* (App. 7b-35b).

As "[t]he purpose of the case-or-controversy requirement is to 'limit the business of federal courts to questions presented *in an adversary context* and in a form historically viewed as capable of resolution through the judicial process,'" *GTE Sylvania Inc* v *Consumers Union of the United States, Inc.*, 445 U.S. 375, 382 (1980) (emphasis supplied), *quoting, Flast* v *Cohen*, 392 U.S. at 95, the deficiencies here are self evident. For all of its intrinsic value to both Bench and Bar, this case lacks "[t]he clash of adverse parties [that] "'sharpens the presentations of issues upon which [an Art. III] court so largely depends for illumination of difficult . . . questions.'" *GTE Syulvania Inc.* v *Consumers Union*, 445 U.S. at 382-383, *quoting, O'Shea* v *Littleton*, 414 U.S. 488, 494 (1974) and *Baker* v *Carr*, 369 U.S. 186, 204 (1962).

Other factors indicate there exist serious, if not "insuperable

obstacles" to justiciability. *See Socialist Labor Party* v *Gilligan*, 406 U.S. 583, 588 (1972). For example, issues interjected by the Michigan Court or Fact-finder are undoubtedly not justiciable, because, as to them, the parties are clearly not in dispute. *Williams* v *Zbavaz*, 448 U.S. 358, 367 (1980).[22]

Also, albeit Appellee concedes that deciding whether this case is justiciable is a matter of federal law solely for the Court, *Princeton University* v *Schmid*, 455 U.S. 100, 102 n.1 (1982), such in no way diminishes the significance, to making that determination, of the Michigan Court's views on the non-adversarial nature of the proceedings and the character of Falk's efforts under local remedial law. Wisdom would dictate circumspection since in a very real sense, the supervisory proceedings continue on to this very day to consider many issues discussed in *Falk*.[23]

Moreover, and in view of this, a healthy federalism would suggest the Court refrain from rendering decision. As the

[22]The Michigan Court properly addressed several questions not raised by the parties in the supervisory proceedings. Most significant being the question Mr. Falk repeatedly states he does not ask (J.S. 9, 20): whether or not compelled membership in the State Bar violates the First Amendment. Of course, this is the lynch pin upon which each inquiry regarding particularly expenditures must turn. *See Ellis v. Railway Clerks*, 104 S.Ct. at 1896. All of the Justices of the Michigan Court, some impliedly, others explicitly, addressed this question considered by a plurality, but avoided by a majority of this Court in *Lathrop v. Donohue*, 367 U.S. 820 (1961). The limitations imposed by Art. III take this critical and antecedent question beyond the pale of this Court's powers to decide. Further, even if this Court were to conclude that some of those interjected issues were somehow, technically justiciable because Mr. Falk belatedly (and benignly) acquiesced in them, review nevertheless would be foreclosed; they were not properly raised below. *See, e.g.*, note 12 *supra* where an alleged improper expenditure was not properly raised by Appellant.

[23]The Michigan Court, by separate order explicitly citing *Falk*, appointed a Committee to further review the activities of the State Bar. (App. 1b-2b). The Committee made its report on September 17, 1984, and, as of this date, the report has not been made public nor has the Michigan Court acted on it. While it cannot be seriously contended that this matter is not final under 28 U.S.C. § 1257 (1982), the pendency of the Committee proceedings does effectively illuminate the supervisory, non-justiciable characteristics of the subject proceedings — *i.e.* that *Falk* represented but a small part of the larger Inquiry.

Michigan Court is still deliberating and conceivably could exercise its purely state law prerogative in a variety of ways, its conclusions "might avoid in whole or in part the necessity for federal constitutional adjudication; or at least might materially alter the nature of the problem." *Harrison* v *NAACP*, 360 U.S. 167, 177 (1959).[24]

There stands the irrebutable fact that the Michigan Court is the paramount constitutional administrator over Michigan's justice system and, in that capacity, has sanctioned the challenged activities of the State Bar. The State Bar is, itself, then powerless to grant the relief Appellant seeks since "the prospect of effective relief against [it as] a defendant depends on the actions of a third party." *Duke Power Co.* v *Carolina Envtl. Study Group*, 438 U.S. 59, 101 (1979), *quoting, Warth* v *Seldin*, 422 U.S. at 505. Hence "no justiciable controversy exists against this defendant." *Id.* Simply put, assuming Appellant otherwise has concrete personal claims, they are presently asserted against the wrong party.[25] Only the Michigan Court can afford Appellant relief.

Finally, and at a minimum, the Michigan Court's ultimate disposition of the matter — a simple dismissal of the "Petition for Special Relief" — rests upon an adequate non-federal basis,

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[24]Abstention is particularly appropriate when a state court has a matter pending before it that will likely resolve state law questions underlying federal claims. *Harris County Comm'rs Court v. Moore*, 420 U.S. 77, 83 (1975). Applying the abstention doctrine, the First Circuit recently vacated a District Court Judgment involving a First Amendment challenge to activities of Puerto Rico's integrated Bar or "Colegio de Abogardos", due to the pendency of related proceedings in the Supreme Court of Puerto Rico. *Romany v. Colegio de Abogados*, No. 83-1586, slip. op 19-28 (1st. Cir. Aug. 23, 1984), *vacating, Schneider v. Colegio de Abogados*, 565 F.Supp. 963 (D.P.R. 1983).

[25]*Louis v. Supreme Court of Nev.*, 490 F.Supp. at 1180. As the Bar is a part of the Court subject to its supervision, Appellee invited such supervision below. Having then obtained such, the Bar cannot now deunify itself or, more aptly, make other major modifications; only the Michigan Court could provide such relief. After all, that relief was only theoretically possible in the Michigan Court because it is Appellee's superintendent.

given the important deficiencies found to exist under Michigan law and practice.

C. This Matter Has Not Been Presented In Timely Fashion

A Jurisdictional Statement must be filed within ninety (90) days of judgment or denial of rehearing, Sup.Ct.R. 12.1 — the only exception being that a Justice of this Court may, for good cause shown, extend the time for a period not to exceed sixty (60) days provided application is made within ten (10) days of the specified final filing date. Sup.Ct.R. 12.2, 29.2. Such applications are disfavored. Sup.Ct.R. 12.2. The Jurisdictional Statement must also conform with the form mandated by Rule, Sup.Ct.R. 15.2, otherwise it will be returned by the Clerk. Sup.Ct.R. 33.7. That is precisely what occurred in this case. Although this Court will not ordinarily deem such a defective filing untimely, the 1980 Revision of the Court's Rules now puts the onus on the Appellant to *promptly* remedy the problem. Sup.Ct.R. 33.7. Appellee submits that Appellant's ninety-four (94) day delay in substituting new and proper copies was *not prompt*, (the two (2) submissions are identical in content), and accordingly, the case should be dismissed. Promptness within the meaning of Sup.Ct.R. 33.7 should not be interpreted to provide Appellant a *de facto* extension of time beyond sixty (60) days — relief a Justice of this Court is not even empowered to grant upon "good cause" shown. Sup.Ct.R. 12.2; 28 U.S.C. §2101(c) (1982). The Rules of this Court were designed to facilitate expeditious treatment of an inordinate volume of cases and the most pressing issues in our society. Appellant's tardy efforts undermine that significant institutional purpose. *See Pittsburgh Towing Co.* v *Mississippi Valley Barge Line Co.*, 385 U.S. 32, 32-33 (1966); *Landry* v *Boyle*, 393 U.S. 220 (1968).

THE FEDERAL QUESTION IS NOT SUBSTANTIAL

Over twenty years ago, Mr. Justice Harlan observed that it "borders on the chimerical" to argue that the use of Bar dues

to support "causes" to which an individual member does not subscribe is violative of the First Amendment. *Lathrop* v *Donohue*, 367 U.S. at 852 (Harlan J., concurring). That insight all but foreclosed the subject until *Abood* precipitated renewed interest in determining permissible constitutional limits of integrated Bar activity. Despite the conceptual problems with analogizing a compulsory Bar Association to a labor union, a few lower courts and commentators, misperceiving the import of *Abood*, quickly concluded that every Bar activity had to be justified under the most exacting (and in their view only) First Amendment standard. Namely, every activity had to fulfill a compelling governmental purpose which could not be implemented by any less drastic means. *E.g.*., (J.S. App. 59-65 [411 Mich. at 106-12]).

On a theoretical level, it cannot seriously be imagined that the benign, indirect and content neutral (if at all existent) infringements which might ensue from expenditure of compelled dues could ever be compared, for analytic purposes, to the explicitly political, direct and content based inhibitions upon association which generated such a standard. *E.g., NAACP* v *Alabama ex. rel. Patterson*, 357 U.S. 449, 462-63 (1958). *See* L. Tribe, *American Constitutional Law* § 12-23, at 703 (1978). Nevertheless, this Court did not until recently find it necessary to elaborate upon the topic, except to prohibit, in the agency shop context, expenditures not "germane" to the collective bargaining process. *See Ellis* v *Railway Clerks*, 104 S.Ct. at 1891-92. Accordingly, and prior to *Ellis*, the wake of *Abood* left definite uncertainty regarding such matters.

However, the necessity for resolving such ambiguity was put to rest by *Ellis*. The federal question presented is not unsubstantial. In *Ellis*, this Court determined that when an employee objects to an expenditure under the Railway Labor Act, "the test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative . . ". *Ellis* v

Railway Clerks, 104 S.Ct. at 1892. Not only may dissenting employees be assessed the direct costs of collective bargaining "but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative . . .". *Id.*

Ellis therefore reiterates in explicit terms the proposition put somewhat cryptically in *Abood* and *Brotherhood of Railway & Steamship Clerks* v *Allen*, 373 U.S. 113, 121-22 (1963); *i.e.*, once the compelled association is justified by an overarching governmental interest, particular expenditures need only be "germane" to that legitimate concern. "Relate to the work," "necessarily or reasonably incurred," "sufficiently related", "normally or reasonably employed," or "within acceptable range" in contradistinction to "attenuated connection," "most distant," "attenuated benefit," "extended [too] far," or "[a] far cry [from]", all describe the connection between a compelling governmental interest and, respectively, permissible and impermissible expenditures. *Ellis* v *Railway Clerks*, 104 S.Ct. at 1892-97. When synthesized, these phrases from *Ellis* readily reveal that whether or not a sufficiently reasonable relationship exists between a particular expenditure and the general governmental interest is determinative of its constitutional propriety. Although the Michigan Court did not have the benefit of *Ellis*, all of its opinions indicate that the challenged activities would have easily been justified under such a standard.

Ellis also suggests another reason why the federal question presented is not substantial. While the First Amendment "does limit the uses to which the union can put funds obtained from dissenting members," *id.* at 1896, the Court went on to state that "by allowing the union shop at all, we have already countenanced a significant impingement on First Amendment rights." *Id.* Therefore, the critical inquiry is focused upon whether the antecedent compelled assocation — *i.e.* here, forced membership in the State Bar — can be justified. If a compelling governmental interest supports that association, then expen-

ditures of dues in furtherance of its are allowable unless, of course, such "expenses involve *additional* interference with First Amendment interests of objecting employees [or members]" which are not "adequately supported by a governmental interest." *Id.* (emphasis supplied).

The constitutionality of compulsory Bar membership was established in *Lathrop.* However, even if the viability of that precedent were uncertain, Mr. Falk concedes he may constitutionally be compelled to be a member of the Bar. In view of this, little else need be said. Challenges directed at the Bar's social functions and at activities designed to foster public awareness of, access to legal services and to protect the public from misappropriation of client funds are unquestionably justified since, "the fact that the employee [or member] is forced to contribute does not increase the infringement of his First Amendment rights already resulting from the compelled contribution to the union [or Bar Association]." *Ellis* v *Railway Clerks,* 104 S.Ct. at 1896. As Justice Boyle found below, (J.S. App. 17-19 [418 Mich. at 293-95]), no protected First Amendment interest is implicated by such activities. Appellant "may feel that [his] money is not being well-spent, but that does not mean [he has] a First Amendment complaint." *Ellis* v *Railway Clerks,* 104 S.Ct. at 1896.

Regarding Bar involvement in the legislative process, the potential for First Amendment infringements may be greater.[26] (Technical assistance in drafting legislation does not, it is respectfully suggested, implicate constitutional interests.) Nevertheless, the Record categorically shows that only a tiny fraction of the Bar's legislative contacts involved attempts to influence legislation and, even then, were carefully monitored

[26]The Third Circuit, in the first decision to address the constitutionality of "lobbying," found *Ellis* reaffirmed the "germane" standard, sustained a New Jersey statute permitting a public employees' union to "lobby" and further noted that, "lobbying has no different constitutional implications than any other form of union activity that may be financed with representative fees." *Robinson v. New Jersey,* No. 82-5698, slip. op. 26 (3d. Cir. Aug. 6, 1984).

efforts concerning matters upon which the input of lawyers, due to their peculiar knowledge and skills, was vital. Moreover, it is undisputed that the Appellant is free to express, at any time and in any way, contrary ideas and views to those adopted by the Bar. Further, the likelihood of others associating the Bar's publicly adopted positions with Appellant is, at best, remote. (J.S. App. 19-23 [418 Mich. at 295-289]). Undoubtedly, any alleged infringement is benign and indirect.

Finally, the significance of lawyers' unique, broad-based and irreplaceable service to the Legislature concerning matters touching upon the law, cannot be overstated in the calculus to determine permissible activity. Although this Court properly dispelled the notion that lawyers are mystic figures magically immune from the Constitution in cases like *Bates* v *State Bar of Ariz.*, 433 U.S. 350 (1977) and *Goldfarb* v *Virginia State Bar*, 421 U.S. 773 (1975), it has nevertheless recognized — often in just such cases — that they also play a unique role in government and society. "The interest of the states in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and historically have been 'officers of the court.'" *Id.* at 792. The point was made again this term when the Court noted that, "[f]ew other professions are as close to "the core of the State's power to protect the public." Nor is any trade or other profession as "essential to the primary governmental function of administering justice." *Hoover* v *Ronwin*, 104 S.Ct. 1988, 1996 n.18 (1984). As Justice Boyle noted below,

> "The State Bar is, of course, made up of lawyers whose business necessarily entails knowing, understanding, utilizing and interpreting the law. In this sense, the State Bar is quite diferent from the labor union involved in *Abood*. It is true that the government might have a keen interest in legislative participation of a labor union in specialized areas of law, touching directly on the field of employment of union members or in the area of collective bargaining. But lawyers are involved with the

> law in almost all its forms. Therefore, their input is of broader interest to the Legislature.
>
> In addition, the bar brings its collective experience in working with the law to the lobbying efforts and technical advice which it offers the Legislature." (J.S. App. 21-23 [418 Mich. at 297-98])

Such challenged expenditures are therefore "well within the acceptable range." *Ellis* v *Railway Clerks*, 104 S.Ct. at 1896.

PRAYER FOR DISMISSAL OR AFFIRMATION

In view of the foregoing, Appellee prays the Court dismiss the appeal or affirm the Judgment below. If, however, the Court believes a substantial federal question is presented, is justiciable and otherwise properly before it, Appellee respectfully suggests the matter is unique in the life of Bench and Bar in this Republic. The uncertainty of *Abood's* application to Bar Associations, although apparently resolved by *Ellis*, has left integrated Bars sincerely desirous of guidance from the Court as to the permissible scope of their activities. As lawyers, our first obligation by oath is to uphold the Constitution.

The Record in this matter is singularly unique and unlikely to ever be paralleled. Therefore, on a keenly practical note, Appellee submits that this case, as opposed to other cases, offers the Court a proper vehicle to address these matters of great significance to the administration of justice in this Country.

Respectfully Submitted,

BUSHNELL, GAGE, DOCTOROFF
& REIZEN

BY: GEORGE E. BUSHNELL, JR.
(Counsel of Record)

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Dated: September 28, 1984

APPENDIX

I

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AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 31st day of January in the year of our Lord one thousand nine hundred and eighty-four.

Present the Honorable G. MENNEN WILLIAMS, Chief Justice, THOMAS GILES KAVANAGH, CHARLES L. LEVIN, JAMES L. RYAN, JAMES H. BRICKLEY, MICHAEL F. CAVANAGH, PATRICIA J. BOYLE, Associate Justices.

IN THE MATTER OF THE SUPERVISION OF THE STATE BAR OF MICHIGAN

On order of the Court, this Court having decided *Falk* v *State Bar of Michigan*, 418 Mich ____ (1983), and the Court being of the view that further examination of certain activities of the State Bar is warranted, the following individuals are appointed to constitute a committee to conduct such further examination:

Otis M. Smith, Detroit; Joel M. Boyden, Grand Rapids; Angus G. Goetz, Birmingham; Dennis W. Archer, Detroit; Honorable James Lincoln, Harbor Beach; Elaine Fieldman, Detroit; Martha L. Seaman, Lansing; Sylvia A. James, Detroit; Mary M. Fowlie, Troy; J. Michael Fordney, Saginaw; Michael Brennan Farrell, Lansing; George Sinas, Lansing; Sen. Basil W. Brown, Senate Judiciary Comm.; Sen. Dan L. DeGrow, Senate Judiciary Comm.; Rep. Perry Bullard, House Judiciary Comm.; Rep. John G. Strand, House Judiciary Comm.; Honorable John H. Hausner, Wayne Circuit Court

Specifically, this committee is charged with the duty of examining and making recommendations concerning the following activities of the State Bar:

1) the provision of information and assistance with regard to programs relating to prepaid legal services;

2) the maintenance of lawyer placement services;
3) the taking of positions before the Legislature on subjects which could form the basis for legislative action; and
4) such other activities as the committee deems appropriate for examination.

The committee is hereby requested to provide this Court with its report and recommendations as to these matters on or before July 31, 1984.

I, CORBIN R. DAVIS, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing this 31st day of January in the year of our Lord one thousand nine hundred and eighty-four.

/s/ CORBIN R. DAVIS
Clerk

SEAL

Judge James H. Lincoln, Retired
1829 S. Lakeshore
Harbor Beach, Michigan 48441
517-479-6310

March 27, 1982

Honorable Mary S. Coleman
Chief Justice, Supreme Court of Michigan
P.O. Box 30052
Lansing, MI 48909

RE: *Falk v. Bar*

Dear Chief Justice Coleman:

The Hearing Officer herewith submits the report on Falk v. Bar.

The Supreme Court did not indicate that the Hearing Officer should file a summary of the testimony of each witness along with the finding of facts and recommendations. No summary of testimony had been filed by Judge Schoenberger. However, this Hearing Officer thought such a summary of testimony might be of some use to the Supreme Court, particularly if agreement on the summary could be reached between the Hearing Officer, the Plaintiff and the Defendants.

It has now become necessary to sumit the Hearing Officer's report without the summary of the testimony of each witness.

Mr. Falk's proposed summary arrived in the middle of February. The Hearing Officer had hoped to receive both proposed summaries by an earlier date. However, Mr. Bushnell's proposed summary of testimony of each witness has not yet arrived.

It is impossible to develop a summary of the testimony of each witness without requesting another adjournment.

No matter what summary of testimony the Hearing Officer

finally submitted, there would be numerous exceptions taken to it which would have to be resolved by the Supreme Court by reference to the transcript.

The Hearing Officer did not feel justified in asking another adjournment to carry out a task not indicated by the Supreme Court. Furthermore, the Supreme Court has numerous Commissioners to perform this task *if it is deemed necessary.*

Both Mr. Falk and Mr. Bushnell have been exceedingly cooperative in assisting the Hearing Officer with the fact-finding hearings even though their area of agreement is rather limited.

The Supreme Court now has all of the necessary information and facts available for making a decision by using the "what," the "how" and the "by other means" approach.

The assignment is much appreciated. The Hearing Officer is not seeking another assignment at this time. However, if another assignment from the Supreme Court is ever forthcoming, the Hearing Officer highly resolves not to get hospitalized and cause delay in completing the assignment.

Sincerely,
/s/ JAMES H. LINCOLN
Judge James H. Lincoln (Retired)
Hearing Oficer

Encl.
cc: Mr. Bushnell
Mr. Falk

REPORT OF HEARING OFFICER

Part I

Introductory Statement

1. *IT IS IMPORTANT THAT THIS REPORT BE READ AND UNDERSTOOD WITHIN THE FRAMEWORK OF TWO DOCUMENTS ALREADY FURNISHED BY THE HEARING OFFICER TO THE SUPREME COURT:*

A. Request for Directions from the Supreme Court dated May 27, 1981 (Judge James H. Lincoln, Retired).

B. Falk v. State Bar of Michigan, dated July 27, 1981 (Judge James H. Lincoln, Retired).

2. THE HEARING OFFICER IS AWARE THAT IF THE CASE IS TO BE DECIDED LARGELY ON THE BASIS OF THE OBJECTIVES OF THE BAR ACTIVITIES THAT THERE WAS LITTLE NEED OF FURTHER FACT-FINDING AFTER THE 1978 HEARINGS HELD BY JUDGE MAURICE E. SCHOENBERGER.

3. THE MEASURE OF FACT-FINDING USED BY THIS HEARING OFFICER (LINCOLN) HAS BEEN BASED ON THE THEORY THAT THE *"WHAT"* AND THE *"HOW"* AND THE *"BY OTHER MEANS"* WOULD BE BALANCED AGAINST FIRST AMENDMENT RIGHTS AS THE MEANS OF DECIDING THE CASE. THERE IS NO OTHER WAY TO REASONABLY INTERPRET THE COURT'S ORDER TAKEN TOGETHER WITH THE THREE OPINIONS OF THE COURT.

4. THE HEARING OFFICER EXPRESSES NO PREFERENCE AS TO WHETHER OR NOT THE FALK CASE SHOULD BE DECIDED ON THE BASIS OF THE OBJECTIVES OF BAR ACTIVITIES OR BY WEIGHING THE "WHAT" AND THE "HOW" OF BAR ACTIVITIES AND "BY OTHER MEANS" AGAINST FIRST AMENDMENT RIGHTS.

The assignment given the Hearing Officer is to get the facts concerning the "what" and the "how" of Bar activities and also the facts concerning "by other means."

5. *WHAT HAS BEEN THE SCOPE AND THE DEPTH OF FACT-FINDING BY THE HEARING OFFICER?*

A. Mr. Bushnell expressed concern that one opinion by the Supreme Court indicated a possibility that an order might be entered approving certain Bar activities and then forbidding all other Bar activities. The first hearing had not covered all Bar activities and such an order would cause no little anguish because some activities might be outlawed under such an order without giving the Bar a chance to present their case. (Even paying the bonds on the Bar Building is a Bar activity.) While the Hearing Officer was considering whether or not to ask the Supreme Court for instructions relating to this, other considerations presented themselves.

B. The Supreme Court had directed the Hearing Officer (Lincoln) to make a fact-finding report on lobbying. Bills pending in the State Legislature were being assigned to many of the committees of the State Bar depending on the subject matter of the legislation. Thus it appeared that many if not most of the Bar committees might be involved in lobbying and that some testimony should be taken on these committees. At one point the Hearing Officer debated cutting the hearing short but decided not to do so. Judge Schoenberger could not foresee what additional information might be needed. Neither could this Hearing Officer. So testimony has been taken on all of the committees as well as a number of witnesses from other states that have voluntary Bar Associations. Every effort has been made to get the complete picture before the Supreme Court.

C. The Supreme Court had not defined requisite states' interest within the framework of the "what" and the "how"

and the "by other means" measure for determining First Amendment rights. ***FOR THE PURPOSE OF THE FACT-FINDING HEARINGS, THE HEARING OFFICER DEFINED REQUISITE STATES' INTEREST IN THE MEMORANDUM OF JULY 27, 1981.*** The three-part definition was helpful as a guide to fact-finding. It encouraged very penetrating fact-finding rather than surface fact-finding. The testimony taken at the fact-finding hearing is lengthy. It is broad in scope and has considerable depth.

6. THE SUPREME COURT NOW HAS AVAILABLE SEVERAL THOUSANDS OF PAGES OF TRANSCRIPT RELATING TO BAR ACTIVITIES TOGETHER WITH A LARGE STACK OF EXHIBITS. *IN WHAT FURTHER MANNER CAN THE HEARING OFFICER SERVE THE SUPREME COURT?*

A. There was no disputed evidence taken by Judge Schoenberger in 1978, and there was no indication that an in-depth probe of Bar activities was needed. Judge Schoenberger's report was fairly simple.

B. In the fact-finding hearing held by this Hearing Officer (Lincoln), there is disputed testimony. Also, there is much opinion testimony. There is no clear line between opinion and fact.

C. The Supreme Court has not given any guidelines as to how far the Hearing Officer should go in making this report. The fact that the guidelines for making this report are almost non-existent does not bother the Hearing Officer. ***The Hearing Officer does not intend to spend any time trying to decide what is fact and/or opinion, etc. The Hearing Officer will make such finding of fact, express such opinions and recommendations as he thinks might be helpful to the Supreme Court in deciding the case.***

REPORT OF HEARING OFFICER

Part II

Discussion, Fact-Finding, Conclusions and Recommendations

DEFINITION OF REQUISITE STATES' INTEREST SET FORTH IN MEMORANDUM OF JULY 27, 1981

1. The three-part definition has served a useful purpose, for it has furnished a framework for the hearings. Any definition used by the Supreme Court will probably fall somewhere within the boundaries of this definition if the "what" and "how" and "by other means" approach to decisions is used. It is not as difficult for the Bar to meet as the measure used in Justice Ryan's opinion, but it is the next thing to it.

2. *There are numerous possibilities:*

A. That the definition be adopted as written.

B. That no part of the definition be used.

C. That part of the definition be used and part not used.

D. That the decision be made without writing a definition. of "requisite states' interest." The Hearing Officer believes that in some U.S. Supreme Court decisions, they discuss the facts and then hold that the facts either show or do not show requisite states' interests. No specific definition is used. *This would be the easiest way to write the decision.*

E. That the Hearing Officer's definition be used as a test for Bar activities such as lobbying that are severe infringements of the First Amendment and *not* be used on more benign infringements such as support of *Law Day.*

Many of the activities of the Bar infringe on the First Amendment because of the *forced association only* such as the educational programs or Law Day. However, lobbying infringes not only because of *forced association* but also infringes because of *beliefs.* A review of the numerous activities of the Bar indicates that there is a very real distinction between these

two types of infringements. In most cases this dividing line is fairly clear and sharp between these two types of infringements. In some cases the dividing line is not clear and sharp.

Example I: Some educational programs will not be objectionable from the point of view of beliefs, but applying for federal funds to finance them may be objectionable on political grounds.

Example II: Mr. Falk states "As Law Day is a substitute for International Labor Day ("Red May Day"), it may have political overtones."

If such overtones exist, they would not be sufficient to place Law Day in the classification of Bar activities that infringe on both "forced association" and "belief." "May Day" has overtones. In World War II a "May Day" radio message from a nearby ship had overtones. To some people, May Day means dancing around a May pole. It is possible to assert a political overtone or "belief" factor in any activity under the sun.

There are some activities that fall between the two examples given here. The fact remains that there are two distinct types of infringements.

It may be logical to apply the same test to all infringements on the First Amendment. *But with perfect logic one may proceed along to the grand fallacy.* To apply as demanding and restrictive a test as the Hearing Officer has proposed for severe infringements that encompass both *forced association* and of *belief* such as lobbying falls within the bounds of reality, but to apply such a demanding test to more benign infringements that infringe *because of force association only*, such as Law Day or educational programs, does not conform to reality.

One solution might be simply to use a very demanding test such as the Hearing Officer has proposed for severe infringements that infringe because of both *forced association* and *belief* and then use no definition as to benign infringements or activities that infringe because of *forced association only.* Just

assert that the facts relating to benign activities either do or do not show compelling states' interests. If this method is good enough for the U.S. Supreme Court, it is good enough for this Hearing Officer.

It should be pointed out that no matter what the activity may be, there will always be one or two or more members of the Bar who may assert that they object on the grounds of belief as well as forced association, and that the First Amendment rights were written for every single individual regardless of whether or not the rest of the 225 million people disagree. True! But the U.S. Supreme Court says that the First Amendment is not an absolute and where to draw the line is what the Falk case is all about.

THE HEARING HAS USED THE PROPOSED THREE-PART DEFINITION OF REQUISITE STATES' INTEREST AS A GUIDE TO FACT-FINDING. *THERE APPEARS TO BE NO GOOD REASON FOR NOT USING THE DEFINITION AS A GUIDE TO MAKING THIS REPORT.*

1. It is the best and also the worst definition ever written in the context of weighing the "what" and the "how" and the "by other means" against First Amendment rights.

2. No one who has written a definition in this context has criticized the proposed definition. The definition proposed by the Hearing Officer may appear more attractive when alternatives are suggested.

It appears to the Hearing Officer that the best course of action is to continue to use the proposed three-part definition as it relates to lobbying in this report. If a less restrictive definition is adopted by any member of the Supreme Court, there is still no reason why this report will not be equally useful. Many of the findings of fact in this report will be useful no matter what definition is used.

The Falk case was never assigned to a trial court for decision. If the Hearing Officer were sitting as a trial judge, much of what is written in this report as observations and recom-

mendations concerning requisite states' interest would be incorporated in the trial court's written decision.

Young Lawyers Section

There is no disputed evidence as to what the Young Lawyers Section is actually doing. What it all boils down to is that the Young Lawyers Section is engaging in the same types of activities as the rest of the Bar. The Young Lawyers seem to be more active than the rest of the Bar.

The Young Lawyers Section has operated as a *forced association* within a *forced association.*

Admittedly, the forced association of being a member of the Young Lawyers Section has rested gently on its members. Other than getting a little more mail from the Bar many would not even have an awareness of being a member of the Young Lawyers Section.

There is no good reason for forcing anyone being in the Young Lawyers Section if they do not so desire.

It is recommended that the Bar be directed to include a notice anually (one-fourth page or more) informing members who qualify for the Young Lawyers Section that upon request their names will be removed from those listed in the Young Lawyers Section.

All activities of the Young Lawyers Section should stand or fall (such as education or lobbying activities) along with similar activities of the Bar. When the Young Lawyers Section is no longer a forced association, then the measure of whether or not its activities are permissible is measured in exactly the same way as other similar Bar activities.

The transcript of the hearings contains testimony relating to the following committees of the Young Lawyers Section:

Witness	*Committee or Activity*
John McSorley	Chairperson, 1980-81
	ABA Award of Achievement Competition

Donald Gasiorek	Moot Court Committee
James Colbert	Basic Skills Committee
Hon. Michael Harrison	Chairperson, 1975-76 Law Education Programs
John Minock	Child Advocacy Committee
Mary Kay Skullion	Prison Paralegal Project
Frederick Baker	Sixty-Plus Clinic
Michael Legg	Law Office Visitation Day Program
Lawrence Nolan	Supreme Court Admissions Trip Travel and Tours Committee Prepaid Legal Services Committee
Larry Powe	Publications Committee Committee on Alternatives Within the Practice of Law Credit Union Committee
Henry Clay	Annual Meeting Committee
Daniel Stepek	Chairperson, 1977-78 Labor Arbitration Qualification Program
Marc Shaye	Chairperson, 1979-80
John McSorley (recalled)	Scope Committee *Inter Alia* (newsletter)

Most any committee of the Bar, whether or not the committee is part of the Young Lawyers Section, may have some legislative proposal assigned to it for recommendation. However, the Young Lawyers Section is concerned mainly with educational activities — in the broad sense of the word.

Lawyers' Wives

The Supreme Court appears to have approved Law Day activities. The Lawyers' Wives has long promoted an extensive

Law Day program including arranging for essay-writing contests in schools. The value of the time and effort expended is considerable. There is certainly a states' interst in keeping a strong, active Lawyers' Wives organization to promote such programs. If the Lawyers' Wives don't do it, then it will not be done. There is testimony on the record of other activities of the Lawyers' Wives that is "public interest" activity.

It is recommended that the State Bar be permitted to give the Lawyers' Wives a sum not to exceed $5,000 annually, plus a factor for inflation. This payment may be made so long as the Lawyers' Wives continue their Law Day activities and more specifically that they continue to promote the Law Day essay contests in Michigan schools.

The Lawyers Placement Service

If the full cost of the operation were borne by those who used the service, it would not be a cost that would be oppressive — at least by comparison with tuition rates in law schools. (The Hearing Officer has one daughter who has just finished law school at the University of Arizona and passed the Arizona Bar and another daughter who is in her last year of law school here in Michigan. The Hearing Officer admits being prejudiced by evidence not on the record.)

The fact of the matter is that attorneys — even those who have just graduated from law school — are quite capable of finding the modest amount of funds necessary to use the Lawyers Placement Service and bear the full cost thereof.

The Hearing Officer could find nothing that is convincing in the evidence to show why attorneys who use the Lawyers Placement Service should not bear the full cost of the operation.

It is recommended that the Court direct the Bar that none of the costs of the Lawyers Placement Service be paid from mandated Bar dues.

The Commercial Sale of the Bar's Mailing List

It is recommended that the Bar be directed to allocate not

less than one-fourth page in the Bar Journal once a year to inform members that they may have their names removed from the mailing list being used for commercial purposes.

NOTE: It would be good public relations for the Bar to inform the membership once a year that all these travel ads, etc. that they are receiving are not paid for by Bar dues and that the sale of the list is an economic plus for the Bar. Some members at the present time are not aware of these facts and have complained to the Hearing Officer that they receive a lot of junk mail from the Bar. Some members of the Bar are not interested in taking the trips advertised in the literature mailed to them.

THE BAR'S ACTIVITIES ADDRESSED TO INFLUENCING LEGISLATION

Technical Assistance by the Bar in Helping the Legislature Draft (Wording) Legislation

1. From time to time members and/or committees of the State Legislature request aid of the Bar in drafting legislation. It is not implied that the Bar either supports or opposes this proposed legislation. The Legislature is merely using the resource that the Bar has of *experienced attorneys who know how legislation works in practice as well as in theory.*

2. The need for massive input of experienced attorneys at the drafting of legislation is discussed in the *Memorandum dated July 27, 1981,* submitted by this Hearing Officer, and there is considerable evidence in the record that will bear this out.

3. There are about 13 attorneys (staff) drafting about 2,000 pieces of legislation for the Legislature in one session. These attorneys are certainly well-qualified, but for the most part the work of drafting legislation for the State Legislature is not looked upon as a career. The witness produced by Mr. Falk said she passed the Bar three years ago. She was competent. However, advancement lies elsewhere.

4. The basic problem is that those *now drafting legislation have frequently only an abstract idea of how it works out in practice.* Furthermore, the other agencies of government are equally short-handed and may be even more short-handed if their budgets are further reduced. There are but few attorneys in the State Legislature. The attorney input "by other means" is important and the Hearing Officer does not imply that attorney input other than the input by the Bar is not a valuable contribution.

However, the contribution made by the Bar is not only desirable but it has an important states' interest. There are no other means available other than the Bar for making the contribution now being made by the Bar.

5. Legislation that is fairly well-drafted but that could have been better drafted can cause unnecessary litigation expenses and is a burden to the citizens. It is important to the public to have legislation drafted as well as possible.

6. The Bar funnels valuable assistance to the State Legislature in drafting legislation and there is a depth of practical experience with how law operates in actual practice that will not in fact be available unless the Bar continues to assist in giving technical aid in drafting legislation.

7. It is impossible to give much technical assistance in drafting legislation without stepping over the line from time to time and changing the substance of the legislation. *However, it is not implied that the Bar endorses any legislation by reason of the fact that technical aid has been given.*

It is the Hearing Officer's opinion that if the Court permits lobbying for the substance of legislation, the Court should also permit the Bar to give technical help in drafting legislation for the State Legislature. If the Court forbids the Bar to lobby for the substance of legislation, then the Court should forbid the Bar giving technical aid to the State Legislature in drafting legislation.

There is a distinction between the two kinds of activities.

However, the facts are such that the two activities should stand or fall together. It is the Hearing Officer's opinion that technical aid in drafting legislation should be considered under the broad definition of influencing legislation. "Influencing legislation" implies a somewhat broader scope of activity than the term "lobbying." The objective of technical help does not imply either support or opposition. There might be a case made for drawing the First Amendment line between the two types of activities. However, the Hearing Officer thinks this would be impractical to a point of being bad law.

Social Functions

There is very little in the several thousand pages of transcript relating to social functions of the Bar because the Bar has very few social functions. There is no evidence whatsoever that anyone was ever drunk or disorderly at one of the Bar's social functions.

The Hearing Officer has lectured in over 30 states in the Union and often the Bar puts on a cocktail party or dinner in connection with these programs. Everyone arrives with a ten-dollar bill and the Ten Commandments and goes home without breaking either one.

It is absurd to say or even imply that any member of the Supreme Court is going to be corrupted or even that a Supreme Court Justice appearing at a Bar function gives the slightest appearance of impropriety.

THERE WERE ONLY TWO SOCIAL FUNCTIONS THAT WERE PUT ON BY THE BAR:

1. The annual meeting of membership: The tickets are paid for by those attending the meeting and no First Amendment rights are involved;

2. When the Chief Justice gave his/her addres on the State of the Judiciary, there was a social event involving the Judicial and Legislative Branches of the Government. This

involved the Justices of the Supreme Court, the Bar Commissioners and also members of the State Legislature.

This social event was financed by mandatory Bar dues. Such an event helps keep the wheels of government turning as between the Legislative and Judicial Branches of Government. The Plaintiff is correct in asserting that this social event is political in nature. The resources that the Courts now have in Michigan did not just happen. Nor did the improvement in the judicial system over the past few decades just happen. These improvements would not have come about except by a great deal of effective lobbying.

For thousands of years mankind has used social events to get more attention on problems and to help create a climate where individuals will listen.

There probably is little or no specific lobbying done at this social event. Like Law Day, this social event even over a period of years can be given no exact value. The event may well be something of a bore to some who attend (not all), but this is not the point.

The fact that the event has taken place is a reminder to legislators that the judiciary and the Bar share with them the common objective of making the legal system work in a free society — and this should be sufficient states' interest for one social event a year if lobbying is determined to be a permissible activity.

Should a member of the Supreme Court accept a free ticket or free invitation to this or any other Bar-sponsored event?

It is recommended that each member of the Supreme Court make this decision individually and not attempt to impose their views on other members of the Court. Each Supreme Court Justice who cares to attend may individually pay or not pay the cost of the food and refreshments (if such there be) to the Bar as each Justice chooses.

Justice Levin's opinion indicated he wanted more facts to be developed relating to social events used for lobbying. There are

few facts available other than produced at Judge Schoenberger's hearings.

What it amounts to is that the one social event that was put on each year that was financed by Bar dues was clearly lobbying.

If lobbying is permitted by the use of mandated Bar dues, then this event should be permitted in exactly the same manner as other lobbying. If the Supreme Court chooses to outlaw lobbying with mandated Bar dues, then this social event should not be permitted if financed by mandated Bar dues.

The pork and shellfish problem is not within the Hearing Officer's area of expertise, and there is little on the record to help solve the matter. It is an argument that does not seem to merit extensive consideration except in theological circles. The Plaintiff is not being forced to eat any food that is forbidden by his religious beliefs. If the Plaintiff were being forced to eat pork or shellfish or if this were all that was served, then this would certainly be a very serious issue.

The Bar's very limited social functions clearly serve a public interest.

If the Supreme Court approves of the Bar lobbying with mandated Bar dues, it is then *recommended that the Supreme Court indicate to the Bar that they may continue to sponsor (with mandated Bar dues) the social events that were sponsored prior to the filing of the Falk case.*

LOBBYING AS APPLIED TO THE THREE-PART DEFINITION SET FORTH IN THE MEMORANDUM OF JULY 27, 1981

1. Lobbying is by far the most serious infringement of First Amendment Rights of any activities carried on by the Bar. Lobbying is the most difficult activity to be constitutionally justified of any of the major activities carried on by the Bar. Certainly the educational activities of the Bar are justified by using the three-part definition proposed by this Hearing Officer.

2. The Hearing Officer proposes to discuss the subject of lobbying in a different order or sequence than the three-part definition that was proposed in the Memorandum dated July 27, 1981.

The order or sequence in which the three-part definition will be applied to lobbying in this report will be as follows:

1. Substance of Bar activity;
2. The "by other means" test;
3. Procedures impacting lobbying activities.

SUBSTANCE OF BAR ACTIVITIES

UNLESS OTHERWISE INDICATED, IN ORDER FOR BAR ACTIVITIES TO HAVE REQUISITE STATES' INTEREST SUFFICIENT TO OVERRIDE FIRST AMENDMENT RIGHTS, THEY MUST BE ACTIVITIES WHICH IF ELIMINATED WOULD SUBSTANTIALLY AND ADVERSELY ALTER THE MAINTENANCE AND EVOLUTION OF THE SOCIETY IN WHICH WE LIVE.

Comment: "Unless otherwise indicated" encompasses minor activities already discussed. Some are not serious infringements on First Amendment rights. They impact forced association but do not infringe on belief except for a very few members who might state any activity infringes on their beliefs.

Educational activities of the Bar are not minor, and if the Bar does not carry on these educational activities, then they will not be done. Educational activities meet the three-part definition proposed by the Hearing Officer. However, this portion of the Hearing Officer's report is directed at lobbying.

In taking the measure of lobbying activity, the following should be weighed in the scales:

1. The number of bills lobbied each year either for or against is relatively small in number.

2. The measure of the impact of lobbying should be viewed over a long period of time — 50 or 100 years or more. There is

a more complete discussion of the "time" factor in the Memorandum of July 27, 1981.

3. There is no effective way or short cut to making a judgment concerning the impact of lobbying by the Bar without looking at a sizable portion of the transcript and the exhibits.

4. If one were to read the testimony of John Robert Dethmers in its entirety and also look at the exhibits admitted into evidence to support his testimony, then one would be undertaking a lengthy and somewhat tedious task. Yet this course of action may be necessary to understand the role the Bar has played in bringing about a much-improved judicial system in Michigan over the past several decades.

Certainly it is impossible to separate out all the factors and forces that brought about a much-improved court structure and other improvements. Success has a thousand fathers, but failure is an orphan.

However, Mr. Dethmers did establish that the Bar played a very important role. This is one example that hits the center of the target of the first part or the first requirement of the three-part definition proposed by the Hearing Officer.

5. The Bar endorses and promotes and opposes legislation of many kinds and degrees of importance. However, what is to be weighed in the scales is the sum total effect of all legislation promoted or endorsed or opposed by the Bar over a long period of time (50 or 100 years).

IT IS ASSERTED BY PLAINTIFF THAT SELF-INTEREST OF THE BAR OR SELF-INTEREST OF ITS MEMBERS IS OFTEN THE DETERMINING FACTOR IN THE LEGISLATION PROMOTED BY THE BAR RATHER THAN INTEREST OF THE PUBLIC.

1. There can be no gainsaying that lawyers are motivated to act in their own self-interest quite as much as any other profession.

2. It would be expected that sometimes endorsements by

the Bar may have been influenced by the self-interest of attorneys rather than the public.

3. However, if the legislation is beneficial to the public, it should not be condemned because it is in the self-interest of some attorneys to see the legislation passed. Thus it would seem that legislation should be measured by the value to the public whether or not it promotes or retards the self-interest of attorneys.

4. It would appear that most of the legislation either endorsed or opposed by the Bar has little or no effect on the self-interest of attorneys.

5. One strong safeguard against self-interest actions by the Bar is the diversity of types of practice and of experience that members of the various committees of the Bar possess. There is an abundance of testimony in the record to support this statement.

6. However, Mr. Falk has raised a valid point. At the conclusion of this report, the Hearing Officer will make recommendations that if adopted will give additional assurance that it will be for the public good and not the good of the Bar or any segment of the Bar that determines the support or opposition of the Bar to proposed legislation.

WHAT SPECIAL INPUT DOES THE BAR HAVE TO OFFER CONCERNING PROPOSED LEGISLATION?

1. The Bar works through its numerous committees.

2. The Bar committees are composed of a cross-section of attorneys. The Bar committees are *not* composed solely of prosecutors or solely of defense attorneys, nor of insurance attorneys, nor of corporation lawyers or whatever. The Bar committees are composed of a mix of attorneys who look at legislation from many points of view and a diversity of experience.

3. Each committee of the Bar has members, the sum total of which represent decades of various types of practice and

practical application of the law and also a wide variety of living besides their years of academic training. Obviously the Bar committees present a far different type of input into proposed legislation than comes from attorneys who represent one segment of the Bar only. This is not to say that various groups of attorneys who represent a particular point of view such as a prosecutor's association, etc., do not have valuable input. They do.

However, the input by the Bar through its broadly based committees, together with the review by the commissioners, is a contribution that is unique and far more extensive than the input from other sources of the legal profession.

4. *THE BASIC QUESTION BEFORE THE COURT AS IT RELATES TO LOBBYING BY THE BAR GOES TO THE QUESTION OF WHETHER OR NOT BROADLY BASED COMMITTEES OF ATTORNEYS, THROUGH THEIR ACADEMIC TRAINING, THROUGH THEIR YEARS OR DECADES OF EXPERIENCE IN THE PRACTICAL APPLICATION OF THE LAW, THROUGH THEIR DIVERSITY IN TYPES OF PRACTICE AND LIVING EXPERIENCE, PRODUCE A PRODUCT OR RECOMMENDATION CONCERNING LEGISLATION, WHEN APPROVED BY THE BAR COMMISSIONERS, THAT HAS A SUBSTANTIAL AND UNIQUE VALUE TO THE PUBLIC.*

THE HEARING OFFICER HOLDS THAT CONSIDERING THE ENTIRE RECORD IN THIS CASE INCLUDING THE EXHIBITS THAT THE REQUIREMENTS OF THE FIRST PART OF THE THREE-PART DEFINITION (SUBSTANCE OF BAR ACTIVITIES) AS IT RELATES TO LOBBYING HAS BEEN MET BY THE BAR ASSOCIATION.

THE "BY OTHER MEANS" TEST

UNLESS OTHERWISE INDICATED, NO BAR ACTIV-

ITY WILL BE PERMITTED WHEN ALTERNATE MEANS ARE AVAILABLE THAT:

1. ARE LESS OFFENSIVE TO OBJECTING PARTIES, AND

2. ARE IN FACT ACCEPTABLE SUBSTITUTES IN THAT THE ALTERNATE MEANS MUST SUBSTANTIALLY CARRY OUT THE ACTIVITIES OF THE BAR.

In the Memorandum of July 27, 1981, the Hearing Officer stated that the issue of the Falk case relating to lobbying might be stated in terms of massive vs. minimal legal or attorney input as far as lobbying is concerned.

THE HEARING OFFICER MAKES THE FOLLOWING FINDING OF FACT:

The input by the legal profession from all resources other than that contributed through the State Bar of Michigan is but a fraction of the input into legislation that is now being furnished by the State Bar of Michigan.

Further, there is no substantial possibility of developing resources in the foreseeable future outside of the State Bar of Michigan that will be an acceptable substitute or that will substantially carry out the lobbying activities now being carried out by the State Bar of Michigan.

Resources outside of the Bar do not furnish the broadly based committee input that is so unique and so valuable. Nor are the resources outside of the Bar in a position to screen or review several thousands of different pieces of proposed legislation each year. The resources outside of the Bar are important and make a valuable contribution, but they can never be a suitable substitute for the input into legislation being made by the State Bar of Michigan.

The Hearing Officer makes the above findings of fact at a time when the records and exhibits of this case clearly show that the number of registered special interests lobbyists has grown apace in Michigan. The amount of special interest

lobbying far exceeds the amount of special interest lobbying of a decade or so ago. Thus the public interest need for the input of broadly based committees of the Bar into legislation has grown apace over the years. The testimony indicates that the Bar has also improved its methods of working with the Legislature.

THE MORE DIFFICULT QUESTION IS WHETHER OR NOT THE LOBBYING ACTIVITIES OF THE BAR COULD NOT BE CARRIED ON BY A VOLUNTARY BAR WITHOUT BEING SUBSTANTIALLY DIMINISHED.

1. It would appear from the three opinions already handed down by the Court in the Falk case that there will continue to be a forced association or mandatory Bar concerning some activities.

2. The question then resolves itself as to what would hapen if members of the Bar in a forced association are asked to make a voluntary contribution to finance lobbying or whatever else may be outlawed by the Supreme Court from being financed by mandatory dues.

3. There is much testimony and discussion in the transcript relating to this question. There is a wide difference of opinion between Mr. Falk and Mr. Bushnell as to what the testimony shows. The Hearing Officer sees no good reason to get additional testimony for the evidence would be only cumulative of that which is already on the record.

4. There are many factors to be considered in making a judgment as to whether or not there would be a substantial decrease in either lobbying or effectiveness of lobbying by the Bar if this activity can no longer be supported by mandatory dues:

The definition of "by other means" proposed by the Hearing Officer would require that there would be a substantial decrease in lobbying and/or effectiveness of lobbying by the Bar over decades of time if mandatory financing is withdrawn in order

for the Bar to meet the Hearing Officer's requirements of requisite state interest. Obviously it would be possible to change this requirement as drafted by the Hearing Officer so that if all other requirements would be met and if resources outside of the Bar could not replace Bar activities, this would be sufficient. It would then be irrelevant whether or not the activity could be financed by voluntary funds. This possibility is suggested because there was not clear mandate from the Court on this point. *In fact, the Court seemed to indicate a probe in depth into possible resources outside of the Bar as perhaps the only range of questioning into the "by other means."* If the Court so holds, then a sizable part of the transcript and of this report need not be considered. It is very clear that resources outside the Bar will never substitute for but a small fraction of the attorney input into legislation furnished by the Bar.

LET US RETURN TO THE DEFINITION THAT THE HEARING OFFICER PROPOSED RELATING TO "BY OTHER MEANS."

1. We are not making a judgment of what would occur in a year or two if mandatory funding for lobbying were withdrawn. We are making a judgment of what would occure over decades of time.

2. The funding available for lobbying might be different if the Bar were entirely a voluntary Bar, as compared to a Bar that is a forced Bar for some activities such as financing the disciplining of attorneys but a voluntary Bar from the point of view of financing-lobbying — *a bifurcated Bar.*

3. A completely voluntary Bar might charge a lump-fund membership fee and then allocate funds to disciplining attorneys and more to lobbying. All sorts of possibilities present themselves the results of which are difficult to measure.

4. However, the situation presented by a bifurcated Bar is certainly different from the situation presented by either a

completely forced funded Bar or a completely voluntary Bar.

5. The annual bill sent out by the Michigan Bar demands $150.00 for long-time members and something less for newer members. However, the bill also contains numerous categories or listings of sections that an attorney may or not join for a stated sum if he/she so desires.

Now, what would occur over a period of decades if the Bar dues were lowered by the amount of the sum now used for lobbying, etc. and another category added to the Bar bill where attorneys could donate to the support of lobbying if they so chose? Who knows what would happen if the matter were handled in this way or in other possible ways? *It is possible to reach some general conclusion from the evidence.*

Witnesses testified that they become involved in Bar activities because the Bar was a mandatory Bar and might not have become involved otherwise. It is very clear that lobbying activities are not going to be increased by withdrawing mandatory support. Even the plaintiff does not so contend.

There are pages of transcript relating to the matter under discussion. The Hearing Officer has spent considerable study time and reflection on this matter before making a finding of fact.

The Hearing Officer makes a finding of fact that considering all the testimony and the exhibits, that to withdraw mandatory financing of Bar lobbying activities would result in a substantial decrease in the amount and the effectiveness of lobbying by the Bar over a period of decades, and more specifically there would be a substantial decrease in attorney input into proposed legislation over a period of decades.

THE HEARING OFFICER HOLDS THAT THE "BY OTHER MEANS" STANDARD AS PROPOSED AND DEFINED BY THE OFFICER IS RESOLVED IN FAVOR OF THE BAR AND MANDATORY FINANCING OF LOBBYING.

PROCEDURES IMPACTING BAR ACTIVITIES

1. The numerous questions raised in Justice Levin's opinion in the Falk case would indicate that it is not sufficient to meet First Amendment requirements for the bar to duplicate procedures similar to the State Legislature. This conclusion is reached because the hearing held by Judge Schoenberger established that the Bar followed pretty much the same procedures as the Michigan State Legislature or the ordinary procedures of a legislative body. *Something more is required of the Bar.*

2. The Hearing Officer (Lincoln) wrote a proposed requirement relating to procedures into the three-part definition of requisite states' interest in the Memorandum of July 27, 1981.

"EVERY PRACTICAL PROCEDURAL CONSIDERATION THAT IS ADVANTAGEOUS TO OBJECTING PARTIES WILL BE REQUIRED OF THE BAR."

The Hearing Officer makes a finding of fact, based on the request for additional information by Justice Levin in his opinion and on the procedural requirements set forth by the Hearing Officer in the Memorandum of July 27, 1981, and on all the records of this case, that the State Bar of Michigan does *not* meet the procedural requirements of the First Amendment as these requirements related to influencing legislation (on lobbying).

IT IS RECOMMENDED THAT THE STATE SUPREME COURT ORDER THE STATE BAR OF MICHIGAN TO EITHER CEASE FINANCING ANY ACTIVITY WITH MANDATORY BAR DUES THAT RELATES IN ANY MANNER WHATSOEVER TO INFLUENCING LEGISLATION OR LOBBYING IN THE BROADEST DEFINITION OF THE TERM OR TO COMPLY WITH THE PROCEDURAL REQUIREMENT HEREIN LAID DOWN.

STATE BAR PROCEDURES REQUIRED TO CARRY

ON LOBBYING ACTIVITIES SHALL INCLUDE THE FOLLOWING:

First Procedural Requirement

The State Bar of Michigan shall neither support nor oppose any particular legislation or do any lobbying whatsoever relating to any proposed legislation without the approval of not less than *three-fourths* of the members of the Board of Commissioners present at the meeting that passes upon the proposed legislation. Whenever the vote is not unanimous, there shall be a roll call vote and the vote of each commissioner shall be recorded in the minutes of the meeting.

(This rule does not apply to technical assistance by the Bar in drafting legislation.)

Second Procedural Requirement

NOTICE OF BAR COMMISSIONERS MEETINGS THAT DISCUSS AND/OR VOTE ON MATTERS RELATING TO INFLUENCING LEGISLATION;

OPPORTUNITY OF ALL MEMBERS OF THE BAR TO GIVE INPUT INTO DECISIONS OF THE BAR TO SUPPORT OR OPPOSE LEGISLATION;

PROCEDURES MUST ENCOURAGE INDIVIDUAL MEMBERS OF THE BAR TO EXPRESS THEIR OPINION ON LEGISLATION AND ALSO ASSURE MEMBERS THAT THEIR VIEWS WILL BE GIVEN CONSIDERATION;

DISPELLING ALL POSSIBILITY OF ANY AURA OF SECRECY CONCERNING BAR PROCEDURES AND DECISION-MAKING BY TOTAL OPENNESS, BY WELCOMING INPUT BY INDIVIDUAL MEMBERS OF THE BAR AND BY GIVING EACH BAR MEMBER TIMELY NOTICE AND INFORMATION PRIOR TO ANY MEETING OF THE COMMISSIONERS IN WHICH LOBBYING MATTERS ARE TO BE DISCUSSED AND/OR PASSED UPON.

(This rule does not apply to technical assistance by the Bar in drafting legislation.)

There shall be mailed to each member of the Bar a *special mailing* prior to any meeting of the Bar Commissioners in which any lobbying matter is to be either discussed or passed upon. This special mailing to each member of the Bar shall include information covering the following matters:

1. A complete agenda for the next Commissioners' meeting including the time, date and place. The mailing shall be posted at the earliest possible date and in sufficient time to give members an opportunity to respond.

2. The agenda enclosed in this special mailing shall list all legislative and/or lobbying matters to be taken up at the next Commissioners' meeting together with a brief statement sufficient to inform the members of the Bar concerning the nature of each piece of legislation.

3. There shall be included in each of these mailings a statement that each member of the Bar is not only welcome to express his/her opinions but encouraged to do so by either attending the meeting, or by letter, telegram or phone call, etc.

4. Whenever there is a roll call vote of the Commissioners (as set forth in the First Procedural Requirement), the results of this roll call vote shall be set forth in the next agenda notice of the Commissioners' meeting mailed to the Bar membership.

Third Procedural Requirement: Technical Assistance

The procedures governing other lobbying activities set forth in this report do not apply to technical assistance given by the Bar in drafting legislation.

THE PROCEDURES GOVERNING THE GIVING OF TECHNICAL ASSISTANCE SHALL INCLUDE THE FOLLOWING:

1. No technical assistance may be given except by written permission of the President of the Bar.

2. The written permission shall contain a statement that

the giving of technical assistance by the Bar does not imply either support or opposition to legislation. A copy of the letter giving written permission to give technical assistance shall be given to the chairman of the committee of the State Legislature requesting the technical assistance or the State Legislator or other person or official requesting the technical assistance.

3. A resume or report on all technical assistance given shall be made annually to the Bar membership. This report shall be included in one of the agendas mailed to each member of the Bar. (See Second Procedural Requirement.)

The Hearing Officer makes a finding of fact that if the State Bar of Michigan adopt the procedures set forth herein, that together with the present procedures (not conflicting with the procedures outlined in this report), that the State Bar will have met the procedural requirements set forth in the Memorandum dated July 27, 1981. This procedural requirement sets forth that: "Every *practical* procedural consideration that is advantageous to objecting parties will be required of the Bar."

Under the present operation of the Bar, the procedures mean very little to the Bar membership at large for they have no way of knowing what is going on — at least before the decisions are made.

The three-fourths vote requirement is not impractical. Such a rule will not harpoon the lobbying activity of the Bar. However, such a rule is an encouragement to dissenters to express their dissent. Suppose that 24 of the Commissioners are present at a meeting and some Bar member or a committee member of the Bar who objects to the majority report of the Bar committee wishes to press his/her objections before the Commissioners. Only 7 votes out of the 24 would be necessary to stop the Bar from taking a position. This is not an unreasonable or impractical rule where the matter of lobbying is concerned.

What the Hearing Officer has done is to recommend the adoption of rules that give the objecting parties every procedural

advantage and at the same time *not* made rules or procedures that would have the effect of making it impossible or impractical for the Bar to carry on activities of influencing legislation.

Furthermore, there is little point in giving Bar members procedural rights unless they are able to give input prior to the Commissioners' vote on any proposed legislation. Without giving prior and timely notice, all procedural rights amount to little more than giving a person the chance to catch a bus that has already pulled away from the curb.

REPORT OF [THE FIRST] HEARING OFFICER [THE HON. MAURICE E. SCHOENBERGER]

The above matter arises out of a Petition filed by Allan S. Falk, Plaintiff. The Petition contests the legality and the constitutionality regarding payment of State Bar dues. Specifically, Plaintiff objects to certain designated expenditures of the State Bar which he contends are for activities that are violative of his rights under the First Amendment of the U.S. Constitution, and Plaintiff requests that he not be required to pay such proportion of his State Bar dues as represent a pro rata share of said illegal expenditures vis-a-vis the total expenditures of the State Bar of Michigan.

On March 2, 1978, the Michigan Supreme Court appointed Maurice E. Schoenberger . . . "as a factfinder before whom the parties shall present evidence, including testimony on the issue Plaintiff raises. Former Judge Maurice E. Schoenberger shall make findings on any factual matters controverted by the parties and submit his findings to the Court."

Between the time of this Order and the hearing on June 5, 1978, under the supervision of the factfinder, Plaintiff Allan S. Falk, and the counsel for the Defendant, State Bar of Michigan, George E. Bushnell, Jr., agreed upon a procedure for discovery as it pertained to the State Bar of Michigan's annual budget. On June 5 and 6 a hearing was held taking two full days.

THE CASE OF THE STATE BAR

By a stipulation of counsel, the parties agreed to reverse the order of proofs and the State Bar of Michigan proceeded with its case first, and called as its first witness Mr. Michael Franck, Executive Director of the State Bar of Michigan. Mr. Franck, after giving his background and other preliminary testimony, explained that the State Bar of Michigan is a unified Bar which came into being by Legislative Act of 1935, said legislation authorizing the unification of the State Bar and the Supreme Court, and in which membership in the State Bar is a prerequisite to practice (page 23).

Following this was testimony relative to the structure and administrative makeup of the State Bar of Michigan (pages 23-45). There then followed the observation by Mr. Franck of the State Bar's growing awareness of its public responsibility and to be involved in public policy issues (page 49) and that this public policy involvement was thought to be germane to the life of the State Bar and the profession of law (page 50). Cross-examination on this preliminary testimony then followed.

On page 73, direct examination began of the State Bar's 1977-78 annual budget. The budget itself was not introduced as an exhibit in the hearing as it was already a part of the pleadings as an attached exhibit to Defendant's Answer to Petition for Special Relief. This budget is attached to this report. The format of the balance of the proceedings was direct examination by State Bar Counsel of Mr. Franck in the general area of revenue and in each of the categories contained within it, and then cross examination by the Plaintiff. After the testmony on revenue was concluded, there then followed (page 137) separate direct examination by the State Bar Counsel of Mr. Franck on each of the twenty-two (22) major categories under Expenditures in the 1977-78 Budget, plus direct examination in the area of Capital Expenditures and certain other accounting categories in the attached budget. After direct examination in each separate category, the Plaintiff

followed with cross-examination. Although cross-examination elicited certain testimony which amplified and sometimes clarified direct examination, at no time in the hearing was the actual dollar amount of the expenditures either challenged or questioned, and as such, the principal finding of fact is that the attached budget contains the accepted figures by both parties concerning both revenues and expenditures for the 1977-78 Budget.

It is worth noting in this report that as the Plaintiff proceeded with cross-examination on the various listed categories within the budget, it was clear that some were objectionable to him, and others were for legitimate functions of the State Bar as the Plaintiff perceived them, and as such were not objectionable. This is consistent with the Plaintiff's petition. However, after an exchange with the hearing officer, both counsel agreed that until the Michigan Supreme Court rendered the ultimate legal ruling on the issues raised by the Plaintiff, no attempt would be made to allocate as a percentage of overhead expenditures those considered to be objectionable (or illegal) vis-a-vis those considered to be legitimate expenditures, again as perceived by Mr. Falk (pages 159-161). This issue, of course, very possibly could be rendered moot, depending on the ruling of the Michigan Supreme Court.

The other witness called by the State Bar (in addition to Mr. Franck) was Mr. John Clark, a private practitioner from Petoskey, Michigan, a past president of the State Bar of Michigan, active on various committees in the American Bar Association, as well as a member and active in the American Judicature Society and other Bar-related organizations. Mr. Clark's testimony, which was taken during Mr. Franck's testimony for the sake of scheduling conveniences, consisted of direct examination by Mr. Bushnell, counsel for the State Bar, and cross-examination by the Plaintiff, Mr. Falk (pages 93-135). Mr. Clark's testimony was in the nature of opinion testimony gleaned from his background of participation in the State Bar and related

Bar organizations. The basic question that was put to him concerned the propriety of the expenditures by the State Bar to which the Plaintiff was objecting. Specifically, one such expenditure involved a reception given annually by the State Bar for members of the Michigan Supreme Court. Another concerned the appropriateness of the State Bar expenditures for activities in conjunction with the American Bar Association and other national legal organizations. Mr. Clark answered in the affirmative, that in his opinion such expenditures were related to and germane to the function of the organized Bar (pages 100-102) and then elaborated on his answer (pages 102-108). Mr. Clark also gave his opinion as to the value of the organized integrated Bar (pages 108-109).

There followed cross-examination in which the Plaintiff challenged the value (and legality) of expending State Bar monies for such items, among other things, as cocktail parties for members of the Supreme Court and Legislature, and for 'lobbying' by the State Bar, at least as the latter term was defined by the Plaintiff, in the State Legislature. The objection was also expressed by the Plaintiff at this time (although this was during cross-examination and not as a matter of proof) that State Bar monies were used for cocktail parties at which port was served, contrary to the Jewish dietary laws. Mr. Clark's testimony, as stated above, was virtually totally in the nature of opinion testimony based on his background, and accordingly, does not lend itself to any ruling by the hearing officer on any controverted issues of fact.

THE CASE OF THE PLAINTIFF

Plaintiff's case consisted of his calling himself for direct examination as his only witness (page 286). His testimony was similar to Mr. Clark's, in that it was a principally opinion testimony. Plaintiff first testified concerning his professional background which consisted exclusively of employment with the Michigan Court of Appeals, both within the research

division and as a commissioner, since his graduation from law school in 1972. Following this, the first area considered was what Plaintiff perceived to be the low level of public confidence regarding practicing attorneys (page 288). He also stated that it was his opinion that the State Bar did a poor job of regulating attorneys (page 290) and provided further elaboration of his opinion on that point. Plaintiff also testified that he was Jewish and that the consumption of shellfish and pork violated the dictates of his religion (page 291). This latter point was an apparent reference to his objection stated earlier in a brief in support of his petition, to the expenditure of State Bar funds for cocktail parties in which these items were served.

Cross-examination of the Plaintiff followed Mr. Falk's narrative testimony (page 293). Cross-examination elicited from Mr. Falk an admission that some of his specific criticisms of the State Bar were more directly the fault of the Michigan Supreme Court (page 294), but that the State Bar was wrong in not criticizing the Court for its lenient treatment of judges and lawyers in suspension and disbarment cases.

The Plaintiff in his direct narrative testimony restated for the record all of the objections contained in his petition. Cross-examination by counsel for the State Bar drew from the petitioner one modification of his objections to the various expenditures (page 300), but Plaintiff otherwise stood by his earlier objections (page 301).

There was some exchange between both counsel and the hearing officer about Mr. Falk's qualification to testify as an expert relative to the competency of the practicing Bar (pages 287-289). It was ultimately decided (page 309) that no ruling would be made on Plaintiff's expertise and that he would simply be allowed to testify as to his opinion in the various areas he wishes, and that the weight given to his testimony, if any, would depend upon his background, cross-examination, etc.

EXHIBITS

In addition to the 1977-78 Budget of the State Bar which was an Exhibit in the pleadings already filed, attached hereto are three exhibits. They are as follows:

1. Plaintiff's Exhibit No. 1 consisted of a form letter from the State Bar of Michigan to all its members from former president, Joseph L. Hartig, Jr. [sic — Hardig], urging the members to join LAWPAC, the Lawyers Political Action Committee.

2. Plaintiff's Exhibit No. 2 consisted of a form letter from the Young Lawyers Section of the State Bar to all of its members containing an initiative petition form for the purpose of putting the question of merit selection of judges on the ballot.

3. Plaintiff's Exhibit No. 3 consisted of a list of the 1977-78 Board of Comissioners of the State Bar of Michigan, showing the age of each one of the commissioners, at the present time, as well as their respective ages when they became commissioners.

All exhibits were introduced by the Plaintiff, and all were admitted by stipulation. In terms of testimony concerning the above exhibits, they did not play nearly as prominent a part of the proceedings as did the attached budget. In fact, most of the testimony, both direct and cross-examination, centered around the budget during the two days of hearing.

CONCLUSION

Although there were differences of opinion concerning the role of the State Bar and what it should spend its money for, there were no controverted factual matters as to the amount of these expenditures, and what their purpose was for. Accordingly, the Hearing Officer makes no findings on any controverted factual matters, there being none. The above report is merely meant to assist the Michigan Supreme Court in reviewing the transcript and making a legal determination on the various legal issues raised by Plaintiff in the hearing and in his petition.

EXHIBIT A OF DEFENDANT'S ANSWER TO PETITION FOR SPECIAL RELIEF

STATE BAR OF MICHIGAN
1977-78 BUDGET

REVENUE	
Membership Dues	$1,796,875
Bar Journal	45,600
Miscellaneous Pamphlets	2,500
Michigan Land Title Standards	5,000
Interest	60,000
Insurance Program	7,500
Lawyer Placement Service	1,000
Miscellaneous	20,000
	$1,938,475
EXPENSES	
CENTRAL OFFICE	
Dues Collection & Updating Computer Lists	$ 40,000
Postage	15,000
Printing and Stationery	6,000
Telephone & Telegraph	10,000
Office Supplies	9,000
Salaries & Fees	103,970
Retirement & Payroll Taxes	18,017
Insurance (Life, Hosp. & Dis.)	7,396
Repairs & Maintenance	4,000
Travel	5,250
Machine Rental	4,000
Books, Dues, Subscriptions	3,000
Audit Fees	4,800
Balloting	8,000
Clipping Service	1,600
Building	33,694
Miscellaneous	2,000
	$ 275,727

STATE BAR GRIEVANCE BOARD	
Postage & Printing	$ 12,950
Telephone	6,650
Travel	10,900
Office Supplies	4,000
Rent & Parking	35,975
Salaries	236,020
Retirement & Payroll Taxes	32,896
Insurance (Life, Hosp. & Dis.)	13,244
Witness, Sub. Fees, Court Reporting (net)	28,600
Meetings	2,650
Clipping Service	500
Repairs & Maintenance	1,000
Books, Dues, Subscriptions	3,000
Machine Rental	600
Stenographic Services	600
Miscellaneous	1,500
	$ 391,085

COMMISSIONERS	
Postage & Printing	5,000
Telephone	2,000
Staff	20,842
Travel	12,625
Meetings	5,000
Building	7,580
Miscellaneous	1,000
	$ 54,047

COMMITTEES	
Postage & Printing	$ 12,000
Telephone	1,000
Staff	48,382
Travel	8,375
Meetings	15,000
Legislation (Including Staff Time)	82,501
Books, Dues, Subscriptions	1,000
Michigan Land Title Standards	1,000
Student Assistants	15,000
Revision of Criminal Code	7,100
Children's Charter	1,000
Revision of Criminal Procedure	3,000
Para-Legal Project	5,000
Supreme Court Rules of Evidence	1,000
Law Related Educational Conference	2,500
Building	21,059
Miscellaneous	3,000
	$ 227,917

YOUNG LAWYERS	
Newsletter	$ 6,500
Travel	7,000
Meetings	4,700
Committees	13,550
Publications	6,000
Administration	3,750
	$ 41,500

BAR JOURNAL	
Printing	$ 171,992
Postage	15,100
Addressing & Mailing	5,360
Staff	47,584
Current Law Notes	2,400
Photographs	1,800
Books, Dues, Subscriptions	100
Special Ethics Issue	31,000
Building	5,054
Miscellaneous	100
	$ 280,430
UPPER PENINSULA INSTITUTE	
Postage & Printing	$ 450
Telephone	50
Staff	2,045
Travel & Hotel	1,350
Luncheons & Dinners (net)	450
Speakers' Hotel & Travel	1,000
Building	842
Miscellaneous	250
	$ 6,437
LAW SCHOOL SUMMER INTERN PROGRAM	$ 12,000

ANNUAL MEETING	
Postage & Printing	$ 7,000
Telephone	450
Staff	11,700
Staff Travel	3,000
Luncheons & Dinners (net)	3,000
Speakers	13,000
Office Machine Rental	600
Reception	1,500
Flowers	400
Buses	500
Special Guests	1,500
Displays	(9,000)
Photographs	500
Sound Equipment	1,200
50 Year Pins	900
Exhibition Service	3,500
Rent	3,000
Building	2,527
Miscellaneous	3,000
	$ 48,277

LOCAL BAR LIAISON	$ 20,250

COMMUNICATIONS	
Program & Planning	$ 14,700
Staff	28,376
Law Day	7,850
TV—Detroit & Outstate	8,185
Publications Fund	24,000
Motion Pictures	1,500
Bar Media Awards	3,500
Public Service Spots	5,500
Public Education	40,000
Building	1,685
Miscellaneous	3,208
	$ 138,504
CLIENT SECURITY FUND	
State Bar Allocation	$ 66,900
Staff	8,775
Building	1,685
	$ 77,360
CHARACTER & FITNESS	
Postage & Printing	$ 3,000
Staff	9,243
Building	1,685
	$ 13,928
ABA MEETINGS	
Travel & Meetings	$ 5,000
Staff	6,842
	$ 11,842

LAWYER PLACEMENT SERVICE		
Postage & Printing	$	150
Staff		4,797
Building		2,527
	$	7,474
ICLE		
Appropriation	$	9,600
Annual Meeting		10,000
	$	19,600
PREPAID LEGAL SERVICES		
Contract	$	61,200
Staff		6,842
Building		3,369
	$	71,411
NATIONAL LEGAL AID & DEFENDER	$	2,500
LAWYERS WIVES OF MICHIGAN		
Postage, Printing & Newsletter	$	2,000
Staff		608
Travel		500
Luncheon Meetings		1,500
Hospitality Room—Annual Meeting		500
Law Related Committee		750
Miscellaneous		500
	$	6,358
STATE WIDE LAWYER REFERRAL	$	17,527

REPRESENTATIVE ASSEMBLY	
Postage, Printing & Meetings	$ 7,500
Staff	5,148
	$ 12,648
LAW STUDENT SECTION	$ 4,500
JUDICIAL SECTION	$ 10,000
TOTAL	$1,751,322
CAPITAL EXPENDITURES	
State Bar Grievance Board	$ 4,000
Central Office	22,040
Building	102,817
	$ 128,857
RESERVE FOR DEPRECIATION	$ 25,000
RESERVE FOR FUTURE GRIEVANCE OPERATIONS	$ 25,000
RESERVE FOR FUTURE OPERATIONS	$ 8,296
TOTAL	$1,938,475

Plaintiff's Exhibit 1

STATE BAR OF MICHIGAN

Joseph L. Hardig, Jr., President

Dear Member of the State Bar of Michigan:

This is a critical election year. The Governor and every member of the Michigan Legislature — 38 senators and 110 state representatives — are up for election in 1978. The very nature of our state government and the policies it pursues for the next four years will be shaped in this summer's primary and the November 7 election.

Concerned citizens in all walks of life will be giving financial support to the candidate they consider best qualified. Members of many professional, business, trade and labor groups concerned with public policy will be among those who in this way take an active part in the political process which shapes our government. To make their participation all the more effective, many will do so in an organized way.

If you are concerned with your government's policies and, as a lawyer and as a citizen, you want your voice to be heard, I urge you to join other concerned members of the State Bar by joining or renewing your membership in LAWPAC — the Lawyers Political Action Committee.

Because active membership in the State Bar of Michigan is required as a condition of practice, State Bar funds may not be used for partisan political purposes. LAWPAC is organized as a voluntary association of lawyers dedicated to making the voice of the profession heard through political action.

Recent changes in federal and state campaign finance laws have made it possible for LAWPAC to be organized as a separate, segregated fund of the State Bar, but no State Bar funds can or will be used to finance LAWPAC's work. Every penny of LAWPAC's contributions to candidates and every penny of its administrative costs will come from money voluntarily contributed.

LAWPAC is directed by an executive committee presently consisting of Eugene D. Mossner of Saginaw, Myzell Sowell of Detroit and Donald L. Reisig of Lansing. Don is treasurer of the fund and Carl Smith, Jr., our local bar liaison representative, will serve as the administrator.

Please do not set this letter aside to decide "tomorrow". If it is to be effective, LAWPAC must have your commitment now so that it can make timely commitments of its support. Political action is one of the most important tools available to any constituency to make itself heard in the government process. We urgently need the help of every lawyer who believes that the collective voice of the profession reflects the public interest and *should* be heard.

You can help by sending your check or money order (no corporate checks, please) for $25 (or more if you are so inclined) payable to LAWPAC, to your local bar association LAWPAC chairperson whose name and address appear on the enclosed list, organized by county.

It's up to you. If you want to be heard, let LAWPAC hear from you — NOW!

With warm personal regards,
/s/ Joseph L. Hardig, Jr.
President

Plaintiff's Exhibit 2

YOUNG LAWYERS SECTION
STATE BAR OF MICHIGAN

November 5, 1977

Dear Young Lawyers Section Member:

You no doubt are aware of the statewide effort being made to implement a process of merit selection of candidates for our State Court of Appeals and Supreme Court. Reform of the

judicial election process for the State of Michigan by adoption of the "Missouri Plan" or modified Missouri Plan has been both discussed and debated throughout our State for a number of years.

Mr. George E. Bushnell, Jr., attorney and appointee of Governor Milliken to Chair the State Committee of Diverse Groups concerning the merit selection and/or appointment of the state judiciary, recently addressed the Young Lawyers Section at its October 19, 1977 meeting in Lansing. It was noted by Mr. Bushnell that there have been four prior efforts by the State Bar individually to institute the merit selection of the judiciary. An excerpt from the minutes of the October 19th meeting containing Mr. Bushnell's remarks discussing the present effort and explanation of the proposed legislation is enclosed.

Regardless of whether we individually or collectively agree with the merit selection or appointment of the Judiciary, or agree specifically with the proposed legislation, we each now have the opportunity and responsibility for at least contributing to place this matter on the ballot for a vote by the general state electorate.

A petition drive has been organized by the "Michigan Citizens to Take Partisan Politics Out of the Courts." Again, this effort is merely to place the question on the ballot, and is neither in support nor in opposition to such a plan. The point is: Let's get the issue before the electorate for debate, discussion and voter response.

On behalf of the YLS, I have enclosed a single Initiative Petition Form which sets forth the proposal in full and will accommodate signatures of fifteen registered voters who are residents of the same County, State of Michigan. In this initial petition drive, you are asked to obtain merely the signatures of members of your family, friends, and associates. The deadline date for return of the executed Petition is set for December 1,

1977. All Petitions should be returned no later than December 1, 1977, to:

State Bar of Michigan
Young Lawyers Section
"Petition Initiative"
306 Townsend Street
Lansing, Michigan 48933

In closing, it is once again pointed out that although many individuals of the Section are in favor of the proposal, this effort which requires your prompt assistance does not advocate nor oppose the proposal, but will, if successful in returning the approximately 350,000 required signatures, place the proposed amendment on the ballot for vote by the general electorate.

As members of the Young Lawyers Section of the State Bar, we believe we have a responsibility to make a total positive effort to allow the entire electorate to individually review the proposed amendment and then decide their position on its adoption at the ballot box.

Your thorough reading of the enclosures and cooperation by circulating, completing and returning the Petition to the State Bar by December 1, 1977 is requested. A full return of executed Petitions will speak positively of each of the young lawyers of this State in meeting the task of maintaining an informed and vocal electorate.

Sincerely,
/s/ JOHN E. McSORLEY
Chairperson — Judicial
Selection Committee — YLS

Excerpt From Minutes of State Bar of Michigan
Young Lawyers Section
Meeting of October 19, 1977

Report and Statement of George E. Bushnell, Jr.
On the Coalition to Remove Judiciary from Partisan
Politics (Appointment and Approval of Appellate Judges)

Mr. Bushnell reported that it is the preferance of the State Bar, by vote of the Commissioners, that at least the Appellate Judges for the State of Michigan be selected on a merit process. He announced that Michael L. Donahue, for the State Bar, and John E. McSorley, on behalf of the YLS, have been appointed to distribute, circulate and collect petitions to place this referendum matter on the ballot to all members of the State Bar. A copy of the Petition, with time table letter, will be mailed to each member of the YLS Section. The details of the referendum were announced by Mr. Bushnell as follows: It is the concern of the constituency, not just the Bar, that judicial reform be undertaken for the betterment of the judicial process. It is the feeling of the parent bar that merit selection of Appellate Judges is the first step in this direction.

Mr. Bushnell has been appointed by the Governor to head the State Committee of Diverse Groups concerning the merit selection and/or appointment of all Judges. Mr. Bushnell's Committee is composed of the League of Women Voters, the State Bar Bureau, the State Chamber of Commerce, the State Bar Association, the State Council of Churches, and Common Cause. He announced that there are several organized groups which oppose the merit selection and appointment of judiciary, listing the main groups to be the AFL-CIO, UAW, the Democratic Party and the Republican Party. The State Bar is actively involved in the petition campaign and is requesting the cooperation of YLS. Mr. Stepek thereby indicated that the Section is giving their support and active participation towards

the distribution, collection of signatures and return of petitions to place this matter on the ballot for vote of the electorate. The proposal as defined by Mr. Bushnell is as follows: The Supreme Court and the Court of Appeals, with the exception of present incumbents who would be grandfathered into office, will no longer reach the judiciary by election, but rather by appointment of the Governor. A list of three candidates per position will be submitted to the Governor for appointment. The Governor must select the appointee from that list of three and retains the option to decline any appointment. Such action must be taken within thirty days. Upon failure of the Governor to appoint, the then Chief Judge of the Supreme Court would select a candidate by draw from the nomination of three.

The Nominating Committee will be comprised of representative members throughout the State, to be balanced by geographic location, sex, race, and will be bi-partisan. The Nominating Committee will be a commission of nine, comprised of six laymen and three lawyers. There will be no more then five members of any one political party, and all members of the Commission will be appointed by the Governor, which will require Senate approval. The terms of the Nominating Committee can serve while in State public office, and each will be limited to two terms of three years apiece.

The judicial candidate once nominated by the Committee must then run in the next general election on the question whether that judge should be retained. The terms of appointment will be six years for the Court of Appeals and eight years for the Supreme Court. The appointed and approved number of the judiciary will then run in a retention election at the expiration of its term and the terms will be limited to four terms for the Court of Appeals and three terms for the Supreme Court.

Mr. Bushnell indicated that there had been four prior efforts by the Bar alone to institute the merit selection of the judiciary, such effort going towards the appellate as well as the trial

level. As to the petitions, the only restrictions are that all signers be voters from the same County on any one petition. All petitions must be turned in by April 1st. However, in the initial effort which involves return of petitions from State Bar Members, such petitions will be due by December 15, 1977 (now, December 1, 1977). In order to place the referendum on the ballot, the collection of signatures from petitions must equal five percent of the vote for Governor in the last general election, which is approximately 350,000 signatures.

The manner in which an individual will make known his desire to be appointed or run for the judiciary will be the same as it is now. The person desiring appointment will submit his name to the Governor or to the Nominating Committee.

BEST AVAILABLE COPY

INFORMATION FOR CIRCULATORS

1. In offering the petition for signature, make sure that the signer is from the county designated on the petition.
2. It is likely that one of the following two things will happen in soliciting petition signatures:
   a. The signer will trust the circulator sufficiently, and will accept a response of "this petition will help make our courts better" in order to generate the signature; or
   b. The signer will request more information regarding the petition.
3. If more information is required, the circulator should suggest that the basics of the constitutional amendment can be found on the back of the petition flyer.
4. If that explanation is insufficient, offer the brochure as an incentive for further understanding.
5. If there is still a lack of comprehension and a reluctance to sign, suggest again that this is a program to take politics out of the courts, and that his or her signature will merely help to qualify this question for the November 1978 ballot.
6. Also suggest that much debate and discussion will ensue concerning this issue between now and November of 1978. During this period of time greater elaboration and comprehension of the issue will be provided.
7. DO NOT ARGUE OR DEBATE THE MERITS OF THE PROPOSAL. Try only to obtain the signature as quickly as possible, while answering all questions as honestly as you can.
8. DON'T TRY TO BE AN EXPERT. Let the petition and the brochure speak to the issue.
9. Remember to sign and date the petition before you turn it in, regardless of how many signatures are on it.

INITIATIVE PE
AMENDMENT TO THE

CITY OF ☐ TOWNSHIP OF ☐	7
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CITY OF ☐ TOWNSHIP OF ☐	9
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CITY OF ☐ TOWNSHIP OF ☐	15

CERTIFICATE OF CIRCULATOR

I, the circulator of this petition, assert that I am qualified to circulate this petition, that each signature on the petition was signed in my presence, that to my best knowledge and belief each signature is the genuine signature of the person purporting to sign the same and that the person was at the time of signing a qualified registered elector of the city or township indicated preceding the signature and that the elector was qualified to sign the petition.

WARNING — Any circulator knowingly making a false statement in the above certificate or any person not a circulator who signs as such or any person who signs a name other than his own

CIRCULATOR — Do not sign or date certificate until after circulating petition.

SIGNATURE OF CIRCULATOR DATE

(CITY OR TOWNSHIP WHERE REGISTERED)

COMPLETE ADDRESS (STREET AND NUMBER OR RURAL ROUTE)

Plaintiff's Exhibit 3

STATE BAR OF MICHIGAN

June 5, 1978

306 Townsend Street
Lansing, Michigan 48933
Telephone (517) 372-9030

1977-1978 BOARD OF COMMISSIONERS
*Indicates Supreme Court Appointee at-Large

		Age	Now
1.	Dennis W. Archer, Detroit	36	34
2.	Ivan E. Barris, Detroit	50	44
3.	Joel M. Boyden, Grand Rapids	41	37
4.	James C. Daner, Mt. Clemens	59	45
* 5.	Julia D. Darlow, Detroit	36	36
6.	Edmond F. DeVine, Ann Arbor	61	59
7.	Leo A. Farhat, Lansing	52	44
8.	Hon. Ralph B. Guy, Jr., Detroit	48	45
9.	William P. Hampton, Farmington Hills	40	39
10.	Joseph L. Hardig, Jr., Birmingham	50	41
11.	Daniel J. Henry, Jr., Grosse Pointe	36	35
*12.	Hon. R. Stuart Hoffius, Grand Rapids	63	57
13.	Patrick J. Keating, Detroit	50	43
14.	John A. Krsul, Jr., Detroit	40	35
15.	Robert E. LeMire, Escanaba	64	58
16.	Dean S. Lewis, Kalamazoo	44	36
17.	Arnold W. Lungrshausen, Detroit	70	61
*18.	Barbara B. MacKenzie, Petoskey	49	47
19.	Patrick A. McDonald, Detroit	42	40
20.	Eugene D. Mossner, Saginaw	48	42
21.	George T. Roumell, Jr., Detroit	49	46

*22.	Charles R. Rutherford, Detroit	49	40
23.	Hon. Gene Schnelz, Walled Lake	45	40
*24.	Myzell Sowell, Detroit	53	46
25.	Daniel T. Stepek, Mt. Clemens	34	34
26.	John M. Wright, Flint	54	51

Mich. Comp Laws §600.901 (1979) State Bar membership; public body corporate.

Sec. 901. The state bar of Michigan is a public body corporate, the membership of which consists of all persons who are now and hereafter licensed to practice law in this state. The members of the state bar of Michigan are officers of the courts of this state, and have the exclusive right to designate themselves as "attorneys and counselors," or "attorneys at law," or "lawyers." No person is authorized to practice law in this state unless he complies with the requirements of the supreme court with regard thereto.

Mich. Comp Laws §600.904 (1979) Same; regulation by supreme court.

Sec. 904. The supreme court has the power to provide for the organization, government, and membership of the state bar of Michigan, and to adopt rules and regulations concerning the conduct and activities of the state bar of Michigan and its members, the schedule of membership dues therein, the discipline, suspension, and disbarment of its members for misconduct, and the investigation and examination of applicants for admission to the bar.

Mich. Comp Laws §600.907 (1979) Same; subpoena, administration of oaths.

Sec. 907. The state bar of Michigan has the power of subpoena, and the authority to take testimony under oath, which may be exercised by its officers, boards and committees for the purpose of aiding in cases of discipline, suspension, and

disbarment of its members, and in cases of applicants for admission to the bar, under such regulations and restrictions as the supreme court may prescribe. The persons exercising the power granted by this section have the power to administer the necessary oaths.

RULE 1
STATE BAR OF MICHIGAN

The State Bar of Michigan is the association of the members of the bar of this State, organized and existing as a public body corporate pursuant to powers of the Supreme Court over the bar of the State. The State Bar of Michigan shall, under these rules, aid in promoting improvements in the administration of justice and advancements in jurisprudence, in improving relations between the legal profession and the public, and in promoting the interests of the legal profession in this State.

RULE 2
MEMBERSHIP

Those persons who are licensed to practice law in this State on December 2, 1935, and those who shall become licensed thereafter to practice law in this State, shall constitute the membership of the State Bar of Michigan subject to the provisions of these rules. Law students may become law student section members of the State Bar of Michigan. None other than a member's correct name shall be entered upon the official register of attorneys of this State. Each member shall file promptly with the State Bar of Michigan a statement setting forth his correct name, his business and residence addresses, and such additional information as may be required. No member shall practice law in this State until such statement is filed. Members shall notify the State Bar of Michigan promptly in writing of any change of name, or business or residence address. The State Bar of Michigan shall be entitled to due notice of, and to intervene and be heard in, any proceeding by a

member to alter or change his name. The name and address on file with the State Bar of Michigan at the time shall control in any matter arising under these rules involving the sufficiency of notice to a member or the propriety of the name used by him in the practice of law or in a judicial election or in an election for any other public office.

RULE 3
MEMBERSHIP CLASSES

(a) Active.

A person engaged in the practice of law in Michigan must be an active member of the State Bar. In addition to its traditional meaning, the term "person engaged in the practice of law" in this rule includes a person licensed to practice law in Michigan or another jurisdiction and employed in Michigan in the administration of justice or in a position which requires that the person be a law school graduate, but does not include (1) a judicial law clerk who is a member or is seeking to become a member of the bar of another jurisdiction and who does not intend to practice in Michigan after his clerkship ends, or (2) an instructor in law. Only an active member may vote in a State Bar election or hold a State Bar office. A person not an active member who engages in the practice of law is subject to discipline or prosecution for unauthorized practice.

(b) Inactive.

An active member may request an inactive classification. He may later be classified as an active member by

(1) applying to the State Bar secretary;

(2) paying the annual dues;

(3) demonstrating that no disciplinary action has been taken or is currently pending against him in another jurisdiction; and

(4) if he was inactive for 3 years or more, obtaining a certificate from the Board of Law Examiners that he

currently possesses sufficient ability and learning in the law to enable him to properly practice as an attorney and counselor in Michigan.

If the inactive member has been or is currently subject to disciplinary action in another jurisdiction, the application must be referred to the Attorney Discipline Board and action on the application delayed until the board makes a decision.

(c) Law Student.

A student in good standing at a law school approved by the Board of Law Examiners or the American Bar Association may be a member of the law student section.

RULE 4
MEMBERSHIP DUES

(a) An active member's dues for each fiscal year (October 1 through September 30), payable at the State Bar's principal office by October 1st of each year, are:

(1) $150, for a member admitted to practice 3 years or more (counting the fiscal year in which admission took place as a full year), admitted from another jurisdiction, or admitted under Board of Law Examiners Rule 5(D);

(2) $90, for a member admitted to practice less than 3 years. For the fiscal year of admission, dues are $90 if admitted between October 1 and March 31, and $45 if admitted between April 1 and September 30.

(b) Dues notices must be sent to all active members before September 20. A 10 percent late charge is added to a dues payment postmarked after November 30. The State Bar must send a written notice of delinquency (by registered or certified mail to the last recorded business address) to a member who fails to pay his dues by November 30. If the dues and the late charge are not paid within 30 days after the notice is sent, the individual is suspended from active membership in the State Bar. If an individual is not subject to a disciplinary order and the suspension is for less than 3 years, he is automatically

reinstated on the payment of dues and late charges owing from the date of his suspension to the date of his reinstatement. If the suspension is for 3 years of more, the individual must apply for recertification under Rule 8 for the Board of Law Examiners.

(c) An active member does not have to pay dues after he becomes 70.

(d) Annual dues for Law Student Section members are established annually by the Board of Commissioners and payable at the State Bar's principal office by October 1st of each year.

(e) All dues are paid into the State Bar treasury and constitute a fund to pay expenses authorized by the Board of Commissioners.

RULE 5
BOARD OF COMMISSIONERS

Section 1. Powers, Functions, and Duties.

(a) The Board of Commissioners shall

(1) implement policy adopted by the assembly;

(2) establish policy for the State Bar between assembly meetings not inconsistent with prior action of the assembly;

(3) manage the State Bar, adopt a budget for it, and supervise receipt and disbursement of State Bar funds;

(4) prescribe the function and duties of committees;

(5) provide for the organization of sections (including a law student section) of the State Bar, membership in which is voluntary, and determine the amount and regulate the collection and disbursement of section dues;

(6) receive and review committee and section reports and recommendations proposing action by the board and take interim or final action that the board finds feasible, in the public interest, and germane to the functions and purposes of the State Bar; and

(7) arrange for the publication of a journal to be issued at least 4 times a year and sent to the active members without charge.

(b) The Board of Commissioners may

(1) adopt bylaws;

(2) appoint standing and special committees, including

(A) character and fitness,

(B) civil procedure,

(C) court administration,

(D) criminal jurisprudence,

(E) fiscal,

(F) grievance,

(G) judicial qualifications,

(H) legal education,

(I) legislation,

(J) professional and judicial ethics,

(K) scope and correlation, and

(L) unauthorized practice of law;

(3) at the request of the governor, the legislature, or the supreme court, or on its own initiative, conduct an investigation of any matter relating to the state's courts or tribunals, to the practice and procedure in them, or to the administration of justice, and report to the officer or body making the request;

(4) acquire and hold real and personal estate by lease, purchase, gift, devise, or bequest, and sell, convey, mortgage, pledge, or release property;

(5) borrow money and pledge for repayment in annual installments, in anticipation of future revenues from annual membership dues, and issue notes, but the total indebtedness outstanding may not at any time exceed 40 percent and the principal installment due in one year may not exceed 8 percent of the revenues from required annual membership dues for the 5 preceding fiscal years;

(6) accept and hold real and personal estate in trust for any

use or purpose germane to the general functions and purposes of the State Bar;

(7) bring an action or proceeding at law or in equity in a state or federal court or tribunal and intervene and be heard on an issue involving the membership or affairs of the State Bar in an action or proceeding pending in a state or federal court or tribunal.

(c) The board may assign these powers, functions, and duties to another State Bar agency but the board may reverse or modify the exercise or a power, function, or duty by a delegated agency.

Section 2. Membership terms. The board consists of:

(1) 19 elected members, each serving a 3-year term;

(2) 5 members appointed by the supreme court, each serving a 4-year term;

(3) the chairperson and immediate past chairperson of the State Bar young lawyers section, each serving for the years during which they hold those positions;

(4) the chairperson and clerk of the assembly, each serving for the year during which they hold those positions.

Section 3. Election Districts; Apportionment.

The board shall establish commissioner election districts consisting of contiguous judicial circuits and containing, as nearly as practicable, an equal lawyer population. The largest geographic area may have the highest deviation from population equality.

The board shall review and revise election districts every 6 years. If, as the result of a revision in election districts, no elected commissioner maintains his principal office in a district or a district has fewer elected commissioners than it is entitled to, the board may designate an elected commissioner or commissioner at large for the district until the next annual election when the vacancy will be filled.

To provide for an orderly transition and to preserve the requirement that approximately one-third of the elected board

members are elected each year, the board may extend the term of an elected commissioner for a period not exceeding one year and the authorized membership of the board will be enlarged for the period affected.

An elected commissioner whose district is merged with another district as the result of a revision of commissioner election districts may nevertheless serve the full term for which he was elected and the authorized membership of the board will be temporarily enlarged for that purpose.

Section 4. Nomination and Election of Commissioners.

A commissioner is elected by the active members having their principal offices in the election district. To be nominated, a member must have his principal office in the election district and file a petition signed by at least 5 persons entitled to vote for the nominee with the secretary at the principal office of the State Bar between May 1 and May 31. Voting eligibility is determined annually on June 1. Before June 25, the secretary shall mail a ballot to everyone entitled to vote. A ballot will not be counted unless marked and returned to the secretary at the principal office of the State Bar in a sealed envelope bearing a postmark date not later than midnight July 7. A board of 3 tellers appointed by the president shall canvass the ballots, and the secretary shall certify the count to the supreme court clerk. A member or a candidate for the board may not be a teller. The candidate receiving the highest number of votes will be declared elected. In the case of a tie vote, the tellers shall determine the successful candidate by lot. In an election in which terms of differing length are to be filled, the successful candidate with the lowest vote shall serve the shortest term to be filled.

Section 5. Vacancies.

The board shall fill a vacancy among the elected commissioners and the supreme court shall fill a vacancy among the appointed commissioners, to serve the remainder of an expired term. If an elected commissioner moves his principal office out

of his election district, the board shall declare that a vacancy exists.

Section 6. Meetings.

The board shall meet during the annual meeting of the State Bar and before the convening of the assembly and shall hold not less than 4 meetings each year. The interval between board meetings may not be greater than 3 months. A special meeting may be held at the president's call and must be held at the secretary's call at the request of three or more board members. At a meeting, a majority of the board constitutes a quorum.

Section 7. Voting.

Each member of the board may cast only one vote. Voting by proxy is not permitted.

RULE 6
REPRESENTATIVE ASSEMBLY

Section 1. Powers, Functions, and Duties.

The Representative Assembly is the final policy-making body of the State Bar. If the State Bar petitions to increase its dues, the Representative Assembly must authorize it.

Section 2. Membership, Officers.

The assembly consists of:

(1) 130 elected representatives;

(2) 12 representatives appointed by the supreme court to represent segments of the profession not otherwise fully represented, including active members not located in Michigan; and

(3) 8 commissioner representatives who are the members of the executive committee of the Board of Commissioners.

Section 3. Election Districts; Apportionment.

The assembly shall apportion the representatives every 6 years. The judicial circuits are the election districts. Each judicial circuit is entitled to one representative. The remaining seats are to be apportioned among the circuits on the basis of

lawyer population, determined on February 1 of the reapportionment year.

Section 4. Nomination and Election of Representatives.

A representative is elected by the active members having their principal offices in a judicial circuit. To be nominated, a member must have his principal office in the judicial circuit and file a petition signed by at least 5 persons entitled to vote for the nominee with the secretary at the principal office of the State Bar between May 1 and May 31. Voting eligibility is determined annually on June 1. Before June 25, the secretary shall mail a ballot to everyone entitled to vote. When an assembly member seeks reelection, the election notification must disclose his incumbency and the number of meetings of the assembly that the incumbent has attended in the following form:

"has attended _____ of _____ meetings during the period of [his or her] incumbency." A ballot may not be counted unless marked and returned to the secretary at the principal office of the State Bar in a sealed envelope bearing a postmark date not later than midnight July 7. A board of tellers appointed by the president shall canvass the ballots and the secretary shall certify the count to the supreme court clerk. A member or candidate for the assembly may not be a teller. The candidate receiving the highest number of votes will be declared elected. In case of a tie vote, the tellers shall determine the successful candidate by lot. An election will occur in each judicial circuit every 3 years, except that in a judicial circuit entitled to 3 or more representatives, one-third will be elected each year. If a short-term representative is to be elected at the same election as a full-term one, the member with the higher vote total is elected to the longer term.

Section 5. Terms.

An elected representative or a representative appointed by the supreme court shall serve a 3-year term beginning with the annual meeting following his election or appointment and

until his successor is elected or appointed. A representative may not continue to serve after he completes two successive 3-year terms.

Section 6. Vacancy.

If an elected representative moves his principal office out of the judicial circuit he represents, the chairperson shall declare that a vacancy exists. If an elected or appointed representative does not attend two consecutive meetings of the assembly without having previously been excused by the chairperson because of a personal or professional emergency, or does not attend three consecutive meetings of the assembly for any reason, the chairperson shall declare that a vacancy exists. The assembly may appoint a lawyer to a vacant seat of an elected representative. The remaining representatives from the affected judicial circuit or, if there are none, the State Bar-recognized local bar associations in the affected judicial circuit, shall nominate a successor. There will be an election for the unexpired term at the next annual election of representatives. The interim appointment ends when the secretary certifies the election count, and the person elected shall take his seat immediately. The supreme court shall fill vacancies in the seats of appointed representatives.

Section 7. Meetings.

The assembly shall meet:

(1) during the annual meeting of the State Bar;

(2) annually in January and May; and

(3) at any other time and place it determines.

A special meeting may be called by the Board of Commissioners and must be called by the chairperson on the written request of a quorum of the Representative Assembly. Fifty members constitute a quorum. The chairperson of the assembly presides at all of its meetings. The assembly may adopt rules and procedures for the transaction of its business not inconsistent with these rules or the bylaws of the State Bar. A

section chairperson is entitled to floor privileges without a vote when the assembly considers a matter falling within the section's jurisdiction.

Section 8. Voting.

Each member of the assembly may cast only one vote. Voting by proxy is not permitted.

RULE 9
DISBURSEMENTS

The Board of Commissioners shall make the necessary appropriations for disbursements from the funds of the treasury to pay the necessary expenses of the State Bar of Michigan, its officers and committees. It shall be the duty of the board to cause proper books of account to be kept and to have them audited annually by a certified public accountant. At each annual meeting the Board shall cause to be presented a financial statement showing the receipts and expenditures of the State Bar of Michigan. Such statement shall also be filed with the Clerk of the Supreme Court and shall be published in the official publication of the State Bar of Michigan preceding the date of the annual meeting.

No officer, member of the Board of Commissioners, member of the Representative Assembly, or member of a committee or section of the State Bar of Michigan shall receive compensation for services rendered in connection with the performance of his duties. They may, however, be reimbursed for the necessary expenses incurred in connection with the performance of their duties.

BYLAWS OF THE STATE BAR OF MICHIGAN
ARTICLE IX
PUBLIC STATEMENTS

No Section, Section council or Committee or member thereof shall assume to represent the State Bar of Michigan before any legislative body, in any court or before any other tribunal unless authorized to do so by the Board of Commissioners.

No report, or recommendation or any action of any Section or council thereof, or of any Committee of the State Bar of Michigan, shall be considered as the action of the State Bar of Michigan, unless and until it has been approved by the Board of Commissioners or the Representative Assembly in accordance with these Rules and Bylaws. Reports, recommendations, or other actions of any Section, Section council or Committee of the State Bar of Michigan not inconsistent with policy adopted by the Board or Assembly may be released, announced or published as the action of such Section, Section council or Committee only when it is determined by the Executive Director of the State Bar of Michigan that:

(a) The report is germane to the purpose of the Section, Section council, or Committee;

(b) The report has been made by a majority of the full membership of the Section, Section council or Committee after notice to the members thereof;

(c) The report reveals that notice was given and the vote on the matter;

(d) The report indicates in a form approved by the Executive Director that it is the action of the Section, Section council or Committee only and does not represent the view or action of the State Bar of Michigan unless and until the Board of Commissioners or Representative Assembly shall have taken an approving action with respect thereto in accordance with the Rules and Bylaws.